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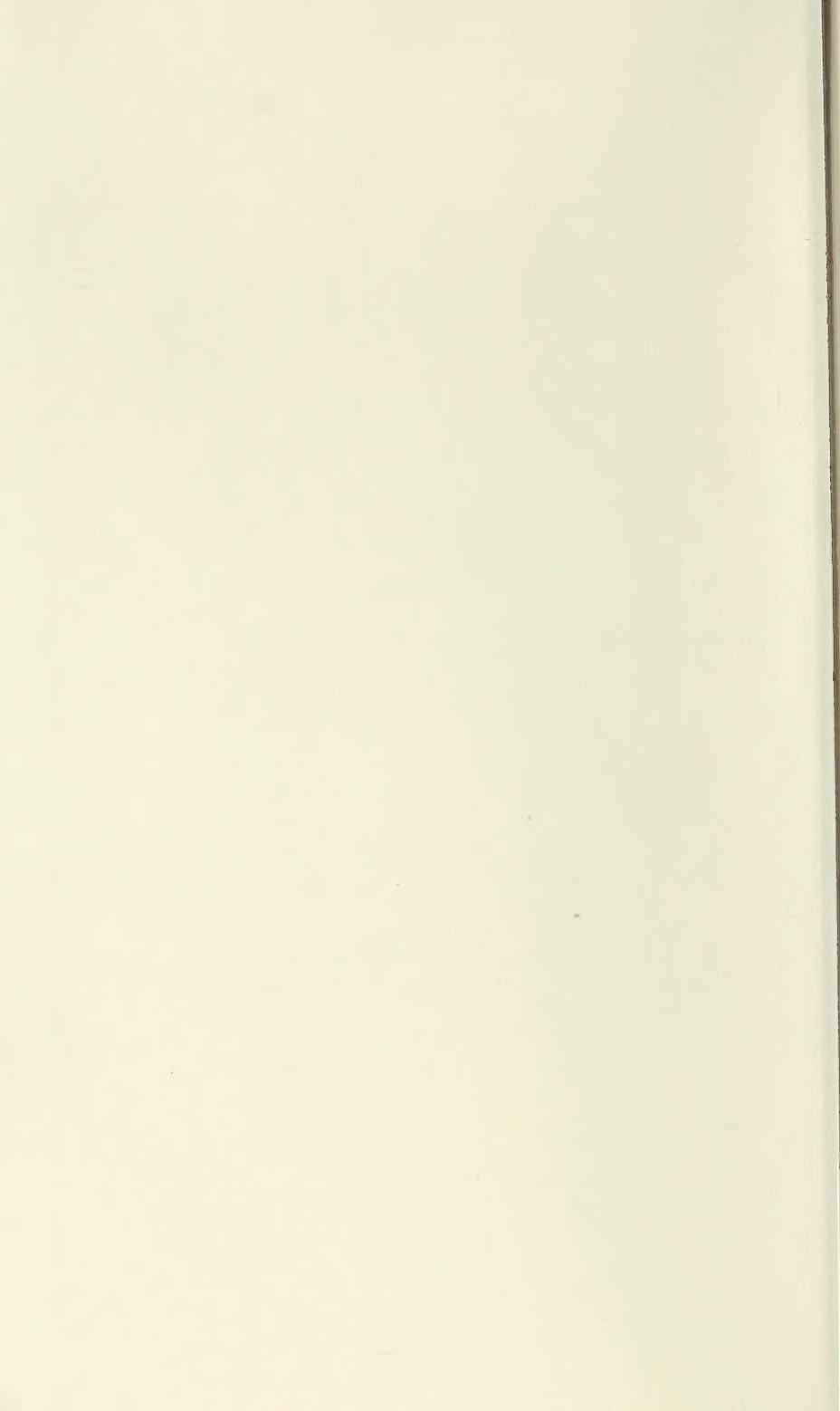
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A
PRACTICAL TREATISE
OF
THE LAW
OF
VENDORS AND PURCHASERS
OF
ESTATES.

BY
THE RIGHT HON. SIR EDWARD SUGDEN.

IN TWO VOLUMES.

VOLUME I.

BONÆ FIDEI VENDITOREM, NEC COMMODOREM SPEM AUGERE, NEC INCOMMODOREM
COGNITIONEM OBSCURARE OPORTET.

Valerius Maximus, l. vii. c. 11.

With notes and References of American Decisions on the Law of Vendors
and Purchasers, to the present time.

BY J. C. PERKINS, ESQ.

SEVENTH AMERICAN FROM THE ELEVENTH LONDON EDITION.

SPRINGFIELD, MASS.
PUBLISHED BY GEO. AND CHAS MERRIAM.

1851.

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TO THIS

SEVENTH AMERICAN EDITION.

THE following work of Sir Edward Sugden, contains an elaborate statement and a thorough discussion of all the points relating to Contracts for the sale of Real Estate. The formation of the Contract—its validity—the evidence that may be introduced to affect it—the mode of rescinding or enforcing it, and the remedy on a breach of it, have each been treated by the author with great amplitude and clearness. No treatise contains so much reliable and practical learning on the subject of specific performance. Not only has the author most fully stated the law as derived from Reports and other books of authority on the subject matters of the work, but he has infused into it a large amount of his own various, practical and accurate learning, extremely useful to the profession, but not to be found in the Reports or other books.

The editor of this American edition has endeavored to adapt the work to the most convenient use of the profession in the United States. The notes to this edition are entirely new. The editor has prepared them without any regard to former editions. Such was found to be the most useful course, although it has

required more labor and involves more responsibility. Indeed the change of editors has rendered this mode of proceeding almost necessary.

It is hoped that the edition will prove acceptable and satisfactory to those, whose studies or business may lead them to consult it.

Salem, July, 1851.

J. C. P.

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TO THE

SIXTH AMERICAN EDITION.

THE work of Sir Edward Sugden on the Subject of Vendors and Purchasers, has long been regarded as a standard Elementary Treatise. The well known reputation of the author as a lawyer, is a sufficient guaranty for the accuracy with which the work is executed. In his Advertisement to this his tenth and last English edition, he observes 'that the alterations and additions are very extensive: the former adapt the Work to the law as it now stands, and the latter comprise every head which properly belongs to the general subject, together with a full view of all the New Laws of Property, and an explanation of their operation on Titles.' Again, he adds:—'The writer has bestowed more time and labor upon this than any former production. He has not presumed upon the kindness with which previous editions have been received, but he has endeavored to merit a continuance of it by making this edition as perfect as his opportunities would permit.'

It has been well observed by a late eminent Judge, that the rules of property should be so certain, that generally men may know their titles, without having recourse to expensive law suits. And when gentlemen learned in the law are consulted, they should have guides to direct them in their advice. The importance of adhering to a course of decisions in the construction of Contracts relating to Real Property, is manifest; for their authority has established a Rule of Property on which many estates depend; and to overturn them, would introduce perplexing uncertainty, and might shake many titles resting on the faith of them.

When a person has become the legal owner of Real Property, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The transfer has its effect from the provisions of law, and unless these provisions are conformed to, the conveyance is not good.

In a country like this, where not only sovereign States, but Corporations of various powers are daily sustaining the relation of either

vendor or purchaser, the subject derives additional importance. Although a grant of land is a contract within the meaning of the Constitution in reference to impairing the obligation of Contracts, which even the Legislature cannot revoke ; yet, there can be no doubt, that land granted by the government of a State, as well as any other land, may be taken by the Legislature in the exercise of the right of eminent domain on payment of an equivalent. Such an appropriation therefore is not a violation of the Contract by which property, or rights in the nature of property, and which may be compensated for in damages, are granted by the government to individuals. Thus, in the late case of the Boston Water Power Company *v.* Boston and Worcester Rail Road Corporation, 23 Pick. 361, it was held, that the right of the plaintiffs, in the land of the full and receiving basins, were not of such a character as to exclude the authority of the Legislature, from taking a small portion of it for laying out a Rail Road, it being for another and distinct public use, not interfering with the franchise of the plaintiffs, in any other way than by occupying such portion of this land. The latter grant was another, and distinct public use, growing up after the former appropriation, and which might be reached, without defeating or essentially impairing the public uses, to which it had already been applied. There being nothing in the nature of the plaintiff's public works, or in the public use to which they were applied, and the extent to which that use would be impaired or diminished, by the taking of such part of the land as might be necessary for the location of the Rail Road, from which the power of locating the Rail Road over it, may be presumed to have been restrained by the Legislature. Both uses might well stand together, with some interference of the latter with the earlier, which may be compensated for by damages.

This edition of Mr. Sugden is valuable from the fact, that it has undergone the learned author's thorough revision ; but its value to the Profession is enhanced from the consideration that the new laws of property in England having made great and essential alterations in the old laws, are contrasted. By such contrast, the defects in the old Laws are manifest, while it points out the reasons and advantages resulting from the new. The author also has at every step freely stated his own opinions as materials to assist the practitioner in arriving at a safe conclusion.

Important as such a work is in England, it is if possible doubly important here, where our laws relating to real property remain to be perfected.

E. H.

May, 1833.

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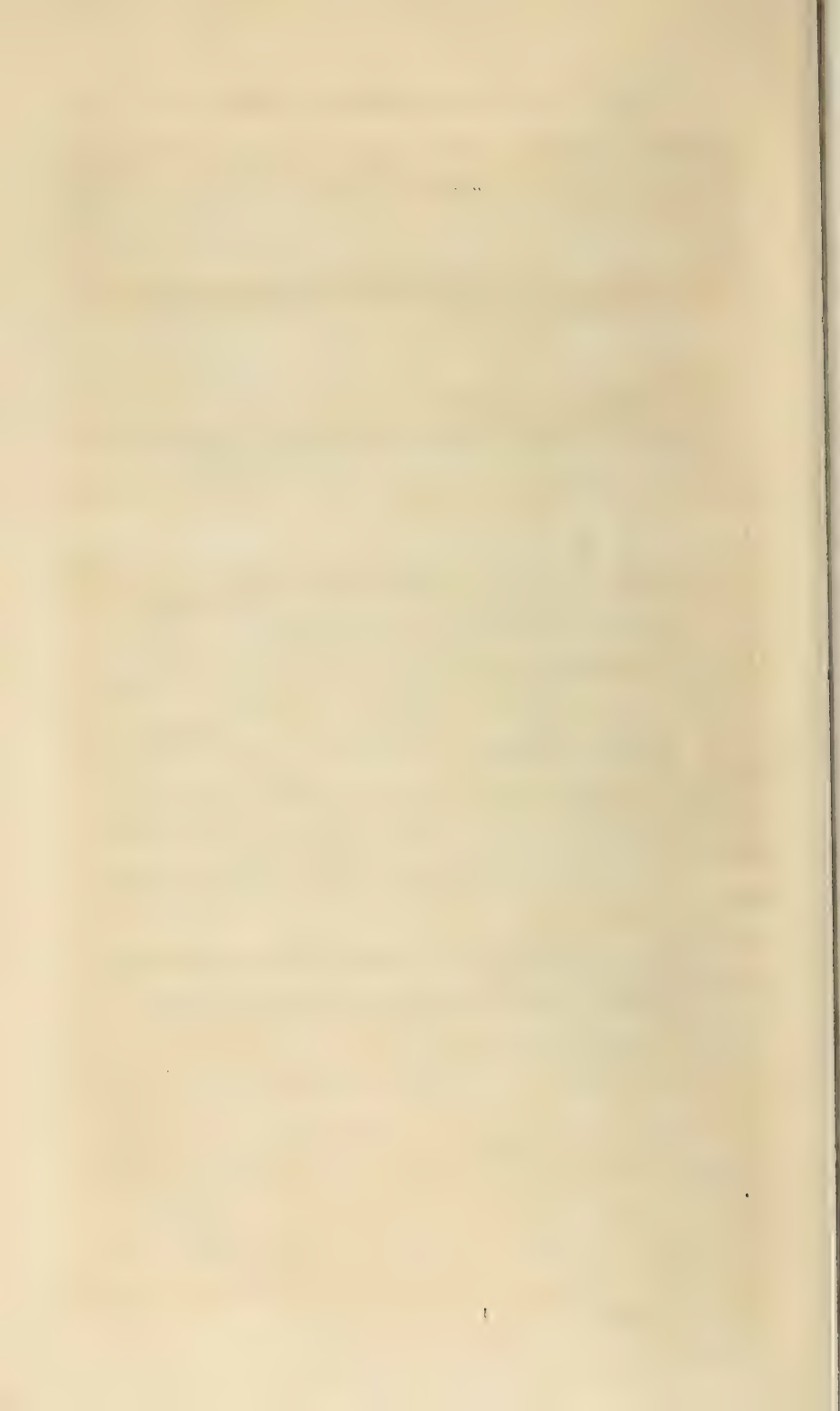
TO THE

ELEVENTH ENGLISH EDITION.

THE Work has been printed in its present form in order to comply with the general desire to have a Treatise, of which such frequent editions are required, published at a moderate price. The Book may be divided into two volumes, for which purpose a separate Title-page for the second volume has been printed, but the three Indexes to the last Edition have been consolidated, and there is, therefore, once more only one Index.

The Cases reported and the Statutes passed since the last Edition have been incorporated into this Edition.

Stephen's Green, May 1, 1846.





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 [The Editor was prevented from examining the proof sheets of the first sixteen pages in the Table of Cases, and most of the following errors escaped notice in consequence.

Alexander *v.* Newton, for i. 80n, read i. 180n.
 Anderson *v.* Foulke, for i. 84n, read i. 71n, 84n, 87n, 90n.
 Annan *v.* Merritt, for i. 704n, read i. 140n.
 Armstrong *v.* Campbell, for ii. 807n, read ii. 887n.
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 For Dowell *v.* Warren, read Dowell *v.* Webber, ii. 608n.
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 Prescott *v.* Nevers, for 63n, read 263n.

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THE LAW

OF

VENDORS AND PURCHASERS

OF

ESTATES.

INTRODUCTION.

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|---|---|
| <ol style="list-style-type: none"> 1. <i>Vendor's liability to disclose defects.</i> 2. <i>Unnecessary where the purchaser has knowledge.</i> 4. <i>Or they are patent.</i> 6. <i>But they must not be concealed.</i> 7. <i>Sale subject to all faults.</i> 9, 10. <i>Random praise by vendor.</i> 11. <i>False statement of value ; small fine ; speedy vacancy ; rich meadow.</i> 12. <i>No Deceit unless party off his guard.</i> 13. <i>False statement of valuation fatal.</i> 14. <i>So of rent.</i> 15. <i>Misrepresentations by a stranger.</i> 18. <i>Misrepresentations and non-disclosures by a purchaser.</i> 19. <i>Must not mislead the seller.</i> 20. <i>Nor conceal a death which adds to value.</i> | <ol style="list-style-type: none"> 21. <i>Concealment of incumbrances and defects in title.</i> 22. <i>Attorney's liability in such cases.</i> 23. <i>Same attorney for both sides.</i> 26. <i>Attorney may not disclose defect to party interested.</i> 28. <i>Obligation of grantor of annuity.</i> 29. <i>Necessity for investigation of title.</i> 30. <i>Result.</i> 31. <i>Purchasers bound by covenants in lease.</i> 32. <i>Inquiry after incumbrances.</i> 34. <i>Where a purchaser may take possession.</i> 36. <i>Purchaser of equitable rights.</i> 37. <i>Auctioneers not to prepare conditions.</i> 38. <i>Title to be investigated before sale.</i> |
|---|---|

1. MORAL writers insist (*a*), that a vendor is bound, *in foro conscientiae*, to acquaint a purchaser with the defects of the subject of the contract. Arguments of some force have, however, been advanced in favor of the contrary doctrine; and our law does not entirely coincide with this strict precept of morality (*b*) (1).

(*a*) Cic. de Off. 3. 13; Grotius de Jure Belli ac Pacis, 1. 2. c. 12. s. 9; Puffendorf de Jure Nature et Gentium, 1. 5. c. 3. s. 2; Puffendorf de Off. 1. 1. c. 15. s. 3; Valerius Maximus, 1. 8. c. 11; et vide Deuteronomy, xxv. 14; Paley's Moral Philosophy, vol. i. b. 3. ch. 7.
 (*b*) Vide *infra*, ch. 7.

(1) See 2 Kent, (6th ed.) 482. 484; Alston v. Outerbridge, Dev. Eq. 18.

*2. If a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise: *scientia enim utrinque par pares facit contrahentes* (c).

3. So, if at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults, and cannot claim any compensation for them.

4. And even if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them, and did not disclose them to the purchaser; yet, if they were *patent*, and could have been discovered by a vigilant man, no relief will be granted against the vendor (1).

5. The disclosure of even *patent* defects in the subject of a contract, may be allowed to be a moral duty; but it is what the civilians term a duty of imperfect obligation. *Vigilantibus, non dormientibus jura subveniunt*, is an ancient maxim of our law, and forms an insurmountable barrier against the claims of an improvident purchaser.

6. In this respect, equity follows the law. But it has been decided, that if a vendor, during the treaty, industriously prevent the purchaser from seeing a defect which might otherwise have easily been discovered, he is not entitled to the extraordinary aid of a court of equity: and it is conceived, that he could not even sustain an action against the purchaser for a breach of the contract (2).

7. And if a vendor know that there is a *lateht* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear that he is not bound to disclose his knowledge, although the estate be sold, expressly subject to all its faults (d) (3).

8. By the civil law, vendors were bound to warrant both the title and estate against all defects, whether they were or were not conusant of them. To prevent the inconveniences which inevitably

(c) Grotius de Jure Belli ac Pacis, 1. 2. c. 12. s. 9. 3; Puffendorf de Jure Nature et Gentium, 1. 5. c. 3. s. 5.

(d) See *post*, ch. 7. s. 4.

(1) 2 Kent, (6th ed.) 484. A mistake as to the value of the consideration given for the conveyance of land, is not a sufficient ground for setting aside the conveyance, where the vendor had the means of avoiding the mistake by inquiry, and no fraud or falsehood was used to influence his judgment. *Warner v. Daniels*, 1 Wood. & Minot, 90, 101, 102; *Mason v. Crosby*, 1 Wood. & Minot, 342.

(2) 2 Kent, (6th ed.) 482 to 484.

(3) See 2 Kent, (6th ed.) 482.

would have resulted from this general doctrine, it was qualified by holding, that if the defects of the subject of the contract were evident, or the buyer might have known them by proper precaution, he could not obtain any relief against the vendor (1).

9. The rule of the civil law also was, "*simplex commendatio non obligat*." If the seller merely made use of those expressions, which are usual to sellers, who praise at random the goods which they are desirous to sell, the buyer, who ought not to have relied *upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved (e) (2).

10. The same rule prevails in our law (f), and has received a very lax construction in favor of vendors. It has been decided, that an action of deceit cannot be maintained against a vendor for having falsely affirmed, that a person bid a particular sum for the estate, although the person to whom the representation was made was thereby induced to purchase it, and was deceived in the value (g) (3).

11. Neither can a purchaser obtain any relief against a vendor for false affirmation of value (h); it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which many men differ. So, where a church lease was described in the particulars of sale, as being nearly of equal value with a freehold, and renewable every ten years, upon payment of a *small fine*, the purchaser was not allowed any abatement in his purchase-money, although the fine was very considerable, and it was proved that the steward of the estate had remonstrated with vendor, before the sale, upon his false description (i). And a statement in the particulars of an advowson, that an avoidance of the preferment was likely to occur soon, was held to be so vague and indefinite, that the Court

(e) 1 Dom. 85.

(f) Chandelor v. Lopus, Cro. Jac. 4; Pike v. Vigers, 2 Dru. and Walsh, 266.

(g) 1 Rol. Abr. 101. pl. 16. See 1 Sid. 146; Kinnaid v. Lord Dean, stated *infra*, n.

(h) Harvey v. Young, Yelv. 20. See

Duckenfield v. Whicheott, 2 Cha. Ca. 204; see Ekins v. Tresham, 1 Lev. 102; reported 1 Sid. 146, by the name of Leekins v. Clissel. [Stevens v. Fuller, 8 N. Hamp. 463.]

(i) Brown v. Fenton, Rolls, 23 June, 1807, MS.; S. C. 14 Ves. jun. 144.

(1) 2 Kent, (6th ed.) 484, 485.

(2) Chitty Contr. (8th Am. ed.) 452; 2 Kent, (6th ed.) 485; Davis v. Meeker, 5 John. 354; Oneida Manuf. Society v. Lawrence, 4 Cowen, 440; Swett v. Colgate, 20 John. 196.

(3) Morrill v. Wallace, 9 N. Hamp. 111. 115; 2 Kent, (6th ed.) 486; Cross v. Peters, 1 Greenl. 376; Fagan v. Newson, 1 Devereux, 22.

could not take notice of it judicially; and that its only effect ought to have been, to put the purchaser upon making inquiries respecting the circumstances under which the alleged avoidance was likely to take place, previous to his becoming the purchaser (*k*). So a statement, that the property is uncommonly rich water meadow land, will not annul the contract, although the land is imperfectly watered (*l*).

12. And in an action of deceit, it is not sufficient to show that the vendor was guilty of a misrepresentation—for example, represented the grantor of an annuity, which was offered for sale, as a man of large property, and that the purchaser need be under no apprehension as to his responsibility, whilst, in point of fact, he was in confinement for debt, and had been so for some time—but it must be shown that some deceit was practised for the purpose *of throwing the party off his guard, and preventing him from being watchful (*m*) (1).

13. But if a vendor affirm, that the estate was valued by persons

(*k*) *Trower v. Newcome*, 3 Mer. 704.

(*m*) *Daves v. King*, 1 Stark. Ca. 75.

(*l*) *Scott v. Hanson*, 1 Sim. 13.

(1) In *Doggett v. Emerson*, 3 Story C. C. 700, it was held, that if a purchaser buys on the faith of a false representation by the seller, touching the essence of the contract, the sale will be set aside in equity, whether the misrepresentation were the result of fraud or of mistake. In this case Mr. Justice Story said;—"It appears to me, that it is high time that the principles of Courts of Equity upon the subject of sales and purchases should be better understood, and more rigidly enforced in the community. It is equally promotive of sound morals, fair dealing, and public justice and policy, that every vendor should distinctly comprehend, not only that good faith should reign over all his conduct in relation to the sale, but that there should be the most scrupulous good faith, an exalted honesty, or, as it is often felicitously expressed, *uberrima fides*, in every representation made by him as an inducement to the sale. He should literally, in his representation, tell the truth, the whole truth, and nothing but the truth. If his representation is false in any one substantial circumstance going to the inducement or essence of the bargain, and the vendee is thereby misled, the sale is voidable; and it is usually immaterial, whether the representation be wilfully and designedly false, or ignorantly or negligently untrue. The vendor acts at his peril, and is bound by every syllable he utters, or proclaims, or knowingly impresses upon the vendee, as a lure or decisive motive for the bargain." This subject was considered at large in *Daniel v. Mitchell*, 1 Story C. C. 172. See also *Small v. Atwood*, 1 Young, 407, 459; *McFerran v. Taylor*, 3 Cranch, 270; *Rosevelt v. Fulton*, 2 Cowen, 134; *Lewis v. McLenore*, 10 Yerger, 205; *Warner v. Daniels*, 1 Wood. & Minot, 107, 108; *Mason v. Crosby*, 1 Wood. & Minot, 342; *Smith v. Babcock*, 2 ib. 246; *Tuthill v. Babcock*, ib. 298; *Waters v. Mattingley*, 1 Bibb, 244.

Where the vendee of land made representations respecting the value of what was taken for the consideration, which were false in material points, and which influenced the vendor to sell, it was held, that they would vitiate the sale, whether the vendee knew them to be false or not. *Warner v. Daniels*, 1 Wood. & Minot, 90; *Shackleford v. Hadley*, 1 A. K. Marsh, 500. So if the false representations were made by another person in the presence of the vendee, and the vendee gained an advantage by them. *Warner v. Daniels*, *ubi supra*; *McMeekin v. Edmonds*, 1 Hill Ch. 288, 293; *Mason v. Crosby*, 1 Wood. & Minot, 342. See *Perkins v. Rice*, Litt. Sel. Cas. 218.

of judgment, at a greater price than it actually was, and the purchaser act upon such misrepresentation, the vendor cannot compel the execution of the contract in equity (*n*), nor would he, it should seem, be permitted to maintain an action at law for non-performance of the agreement.

14. And a remedy will lie against a vendor, for falsely affirming that a greater rent is paid for the estate than is actually reserved (*o*) (I); because it is a circumstance within his own knowledge (1). The purchaser is not bound to inquire further: for the leases may be made by parol, and the tenants may refuse to inform the purchaser what rent they pay; or the tenants may combine with the landlord, under whose power they frequently are, and so misinform and cheat the purchaser. It has been decided also, after great consideration (*p*), that a purchaser may recover against a vendor for false affirmation of rent, although he did not depend upon the statement, but inquired what the estate let for. Where it can be satisfactorily proved that the purchaser did not rely upon the vendor's assertion, a jury would probably give but trifling damages. And it has been laid down (*q*), that if the party to whom the representations were made, himself resorted to the proper means of verification before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification *be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case

(*n*) Buxton v. Cooper, 3 Atk. 383; S. C. MS.; see Partridge v. Usborne, 5 Russ. 195; Small v. Attwood, 1 You. 407. In D. P. upon appeal, the purchasers held to be bound; 6 Cl. & Fin. 232; Pike v. Vigers, 2 Dru. & Walsh, 1.
 (o) Ekins v. Tresham, *ubi sup.*; Lysney v. Selby, 2 Lord Raym. 1118; 1 Salk. 211, S. C. nom. Risney v. Selby; Dobell v. Stevens, 3 Barn. & Cress. 623; Small v. Attwood, 1 You. 407; Fuller v. Wilson, 3 Adol. & Ell. N. S. 58. 68. 1009, *post*, ch. 4, s. 5.
 (p) Lysney v. Selby, *ubi sup.*
 (q) See Clapham v. Shillito, 7 Beav. 146.

(I) In the 1st vol. of Coll. of Decis. p. 332, the following case is reported:—An heritor having solemnly affirmed to his tacksman at setting the lands, that there was paid, by the preceding tenants, for each acre, a great deal more than really was paid, and thereby induced him to take it at a very exorbitant rate, whereby he was leased *ultra dimidium*; yet continued to possess two years before he complained. The Lords found the allegiance of circumvention and fraud, both in *consilio* and in *eventu*, not sufficient to reduce the tack, and that the tenant should have informed himself better what was the true rent, and not have relied on the settler's assertion, and ought to have tried the quality of the ground, and, his eye being his merchant, he had none to blame but himself, especially now that he had acquiesced two years. Kinnaird v. Lord Dean.

(1) Mason v. Crosby, 1 Wood. & Minot, 352, 353.

may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which upon due inquiry he ought to have obtained, and thus the notice of reliance on the representations made to him may be excluded (1).

15. The same remedy will lie against a person *not interested in the property*, for making a false representation to a purchaser of value or rent, as might be resorted to in case such person were owner of the estate (*r*) ; but the statement must be made *fraudulently*, that is, with an intention to deceive ; whether it be to favor the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness, appears to be immaterial (*s*). [The above doctrine stands upon a principle of natural justice, long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action (2) ; and this doctrine is now well settled both in the English and American jurisprudence (3).]

16. And in cases of this nature it will be sufficient proof of fraud to show, first, that the fact, as represented, is false : secondly, that the person making the representation had a knowledge of a fact contrary to it. The injured party cannot dive into the secret recesses of the other's heart, so as to know whether he did or did not recollect the fact ; and therefore, it is no excuse in the party, who made the representation, to say, that though he had received information of the fact, he did not at that time recollect it (*t*).

17. But if the representation amount to an assurance only of

(*r*) [Upton v. Vail, 6 John. 181 ; 2 Kent, (6th ed.) 489, & note ; Bean v. Herrick, 3 Fairf. 262.] Pasley v. Freeman, 3 Term Rep. 51 ; Eyre v. Dunsford, 1 East, 318 ; Ex parte Carr, 3 Ves. & Bea. 108 ; see 6 Scott, 840.

(*s*) Haycraft v. Creasy, 2 East, 92 ; Tapp v. Lee, 3 Bos. & Pull. 367 ; [2 Kent, (6th ed.) 489 and note ; Bean v. Herrick, 3 Fairf. 262 ; Young v. Covell, 8 John. 23 ; Russell v. Clark, 7 Cranch, 69 ;]

and see 6 Ves. jun. 186 ; 13 Ves. jun. 134 ; 12 East, 634, n. ; Hutchinson v. Bell, 1 Taunt. 558 ; De Graves v. Smith, 2 Camp. Ca. 533 ; Foster v. Charles, 7 Bing. 106 ; 4 Moo. & P. 61 and 741 ; Corbett v. Brown, 2 Mood. & Malk. 108 ; 5 Carr. & P. 363 ; Freeman v. Baker, 5 Barn. & Adol. 797.

(*t*) Burrowes v. Lock, 10 Ves. jun. 470, per Sir Wm. Grant.

(1) Warner v. Daniels, 1 Wood. & Minot, 90, 101, 102. But a contract for the sale of a township of land may be rescinded in favor of the purchaser for fraud in the sale, although he had an opportunity to examine the land before the purchase, and did examine it, but did not go into details, and confided for those in the false statements of the person negotiating with him, and of his agents. Smith v. Babcock, 2 Wood. & Minot, 246 ; Tuthill v. Babcock, ib. 298.

(2) Upton v. Vail, 6 John. 181 ; 2 Kent, (6th ed.) 489, and note.

(3) 2 Kent, (6th ed.) 489 & note ; Adams v. Paige, 7 Pick. 542 ; Addington v. Allen, 11 Wendell, 374 ; Gallagher v. Brunel, 6 Cowen, 346 ; Benton v. Pratt, 2 Wendell, 385 ; Livermore v. Herschell, 3 Pick. (2d ed.) 38, note ; Patten v. Gurney, 17 Mass. 182.

a man's ability to answer an obligation, it must, to be binding, be in writing (*u*).

18. A *purchaser* is not liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers (*x*). Nor is a purchaser bound to acquaint the vendor with any *latent* advantage in the estate: for instance, if a purchaser has discovered that there is a mine under the estate, he is not bound to disclose that circumstance to the vendor, although he knows the vendor is ignorant of it (*y*). But a very little is sufficient to affect the application of this principle. If, it has been said, a word, a single word be dropped which tends to *mislead the vendor, that principle will not be allowed to operate (*z*) (1).

19. And equity will not interfere in favor of a purchaser who has misrepresented the estate to any person who had a desire of purchasing it (*a*).

20. If a purchaser conceal the fact of the death of a person of which the seller is ignorant, and by which the value of the property is increased, equity will set aside the contract (*b*). And even at law, if a man seeking to buy a life policy, conceal his knowledge of the extreme danger in which the life is, and underrate the value of the policy, such conduct amounts to *legal* fraud, and he cannot maintain any title to the policy so acquired (*c*).

21. The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instru-

(*u*) 9 Geo. 4, c. 14, s. 6; *Swan v. Phillips*, 3 Nev. & Per. 447; 8 Adol. & Ell. 457; [2 Kent, (6th ed.) 489 in note; Rev. Stat. Mass. ch. 74, §3;] see *Devaux v. Steinkeller*, 6 Bing. N. C. 84.

(*x*) See *Vernon v. Keys*, 12 East, 632.

(*y*) See 2 Bro. C. C. 420.

(*z*) *Per* Lord Eldon, in *Turner v. Harvey*, 1 Jac. 178.

(*a*) See *Howard v. Hopkyns*, 2 Atk. 371; *Young v. Clerk*, Prec. Cha. 538.

(*b*) *Turner v. Harvey*, 1 Jac. 169; and as to concealment generally, see *Harris v. Kemble*, 1 Sim. 128, reversed by L. C. and in D. P.

(*c*) *Jones v. Keene*, 2 Mood. & Rob. 348.

(1) See 2 Kent, (6th ed.) 490; *Parker v. Grant*, 1 John. Ch. 630.

In *Livingston v. Peru Iron Co.* 2 Paige, 390, it was held, that although a simple suppression of truth, by one of the parties to a contract, may not be sufficient to authorize a court to set it aside, yet, if any thing is said or done to mislead or deceive the other party, the court will grant relief against the contract. As in a case where the vendee, applying for the purchase of a lot of wild land, represented to the vendor that it was worth nothing, except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot, of the existence of which the vendor was ignorant, the purchase was decided to be voidable on account of the fraud.

ment by which the incumbrances were created, or on which the defects arise : or to acquaint him with the facts, if they do not appear on the title-deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering. If therefore a seller knows and conceals a fact material to the title, there is no principle upon which relief can be refused to the purchaser (*d*).

22. And Lord Hardwicke laid it down (*e*), “that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in *equity* (*f*) : to which principle it is necessary for the court to adhere, to preserve integrity and fair dealing between man and man : most transactions being by the intervention of an attorney or solicitor.”

23. The same observation applies, and indeed with much greater force, to the attorney or agent of the purchaser. It can seldom happen that the attorney or agent of the purchaser is conscious of any incumbrance on the estate intended to be purchased, unless he be employed by both parties ; which the same person frequently is, in order to save expense. This practice has been discountenanced by the courts (*g*), and is often productive of the most serious consequences ; for it not rarely happens, that there are incumbrances on an estate which can be sustained in equity only, and which will not bind a purchaser who obtains the legal estate, unless he had notice of them previously to completing his purchase. Now notice (*h*) to an agent, although one concerned for both parties, is treated in equity as notice to the purchaser himself ; and, therefore, if the attorney know of any equitable incumbrance, the purchaser will be bound by it, although he himself was not aware of its existence (1).

(*d*) *Per* Sir W. Grant, *Coop.* 312.

(*f*) It seems clear that relief might

(*e*) *Per* Lord Hardwicke, 1 *Ves.* 96 ; now be obtained at law.

and see 6 *Ves. jun.* 193 ; *Burrowes v.* (*g*) See 6 *Ves. jun.* 631, n.

Lock, 10 *Ves. jun.* 470 ; and *Bowles v.*

(*h*) See *infra*, ch. 23.

Stewart, 1 *Sch. & Lef.* 227.

(1) *Le Neve v. Le Neve*, *Ambler*, 436, 439 ; *Dunlap's Paley's Agency*, 262 et seq. and notes ; *Champlin v. Laytin*, 6 *Paige*, 189 ; *Dryden v. Frost*, 3 *Mylne & Craig*, 670 ; *Griffith v. Griffith*, 9 *Paige*, 315 ; *Toulmin v. Steere*, 3 *Meriv.* 210. It has, however, been held, that the notice or knowledge of facts to affect the principal must have been acquired by the agent or attorney in the same transaction. *Le Neve v. Le Neve*, *Ambler*, 439, in note ; *Lowther v. Carlton*, 2 *Atk.* 212 ; *Warwick v. Warwick*, 3 *Atk.* 294 ; *Hiern v. Mill*, 13 *Vesey jr.* 120 ; *Hood v. Fahnestock*, 8 *Watts*, 489 ; *Bracken v. Miller*, 4 *Watts and Serg.* 102, 111 ; 1

24. And by these means, a purchaser may even deprive himself of the benefit to be derived from the estate lying in a register county: the register may be searched, and no incumbrance appear; yet, if the attorney have notice of any unregistered incumbrance, equity will assist the incumbrancer in establishing his demand against the purchaser (*i*) (I).

25. Another powerful reason why a purchaser should not employ the vendor's attorney is, that if the vendor be guilty of a fraud in the sale of the estate, to which the attorney is privy, the purchaser, although it be proved that he was innocent, will be responsible for the misconduct of his agent (*k*). In one case (*l*), a purchaser lost an estate, for which he gave nearly 8,000*l.*, merely by employing the vendor's attorney, who was privy to a fraudulent disposition of the purchase-money.

26. Of course a man's attorney is not at liberty to disclose any defect which he has discovered to the party entitled to take advantage of it, although that party is also his client; and it is no defense that the owner was aware that the attorney was also concerned for the other party (*m*).

27. The seller's attorney, too, should be cautious not to obtain any undue advantage of the purchaser behind his solicitor's back; for not only cannot such advantage be retained, but it may, if deemed fraudulent, induce the court to rescind the contract altogether (*n*).

28. But to return, it has been decided that the grantor of an *annuity is not bound to lay open to the intended grantee all the

(*i*) See *infra*, ch. 21, 22, 23.

Hicks v. Morant, 3 You. & Jerv. 286; 2

(*k*) See *Bowles v. Stewart*, 1 Sch. & Dow & Clark, 414.

106, 227.

(*m*) *Taylor v. Blacklow*, 3 Bing. N.

(*l*) *Doe v. Martin*, 4 Term Rep. 39; C. 235.

(*n*) *Berry v. Armistead*, 2 Kee. 221.

(I) Whenever in any proceeding before a Master the same solicitor is employed for two or more parties, such Master may, in his discretion, require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.—General Orders, 23d Nov. 1831, 77.

Story, Eq. jur. § 408. Still this rule seems not to be entirely settled, and some decisions of great authority hold it dependent upon the circumstances of each case. See *Mountford v. Scott*, Turn. & Russ. 279; *Hargreaves v. Rothwell*, 2 Keen, 154, 157, 160; *Nixon v. Hamilton*, 2 Dru. & Walsh, 364, 390, 392; *Griffith v. Griffith*, 1 Hoff. Ch. Rep. 158; *Nixon v. Hamilton*, 1 Irish Eq. 46; *Lenchan v. McCole*, 2 Irish Eq. 342. And notice to a solicitor in one transaction, which is closely followed by and connected with another, so as clearly to give rise to a presumption, that the prior transaction was present in his mind, and that he could not have forgotten it, is constructive notice to his client in the latter transaction. *A fortiori*, if it is clear, that, at the time of the second transaction, the first was fully in his mind. *Hargreaves v. Rothwell*, 2 Keen, 154, 159.

circumstances of his situation : he is only bound to give honest answers to questions put to him by the intended grantee. If the grantee employ the grantor's attorney to prepare the deeds, the mere preparation of the deeds does not place him in a confidential relation towards the grantee ; but as the agent of the grantor he stands in his situation, and is not bound to do more than his principal (*o*).

29. With the exception of a vendor, or his agent, suppressing an incumbrance, or a defect in the title, it seems clear, that a purchaser cannot obtain relief against a vendor for any incumbrance, or defect in the title, to which his covenants do not extend ; and therefore if a purchaser neglect to have the title investigated, or his counsel overlook any defect in it, he appears to be without a remedy (*p*).

30. To sum up the foregoing observations,—a purchaser is entitled to relief, on account of any *latent* defects in the estate, or in the title to the estate, which were not disclosed to him, and of which the vendor, or his agent, was aware. In addition to this protection afforded him by the law, a provident purchaser will examine and ascertain the quality and value of the estate, and not trust to the description and representation of the vendor, or his agents ; he will employ an agent and attorney not concerned for the vendor, and will have the title to the estate inspected by counsel.

31. Where it is stated upon a sale, even by auction, that the estate is in lease, and there is no *misrepresentation*, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country ; because whoever buys with notice of a lease, is held *conusant* of all its contents (*q*) (1). This rule, it should seem, ought, as between a vendor and purchaser, to have been confined to a contract actually executed by the conveyance of the estate and payment of the purchase-money ; but as the point has been thus decided, no person having notice of any lease, or that the estate is in the occupation of tenants,

(*o*) *Adamson v. Evitt*, 2 Russ. & Myl. 66.

(*p*) See *post*, ch. 12.

(*q*) *Hall v. Smith*, Rolls, 18 Dec. 1807,

MS. ; S. C. 14 Ves. jun. 426 ; *Walter v. Maunde*, 1 Jac. & Walk. 181 ; *Barrand v. Archer*, 2 Sim. 437 ; *Pope v. Garland*, 4 You. & Coll. 394.

(1) If at the time of a contract for the sale of land, there is a lease outstanding, which is unknown to the vendee, the vendee is not bound, but may rescind the contract, the vendor not being in a situation to give a perfect title. *Tucker v. Wood*, 12 John. 190 ; *Jackson v. Wass*, 11 John. 525 ; *Green v. Green*, 9 Cowen, 46 ; *Ellis v. Haskins*, 14 John. 363 ; *Fuller v. Hubbard*, 6 Cowen, 13.

should sign a contract for purchase of the estate without first seeing the leases, unless the vendor will stipulate that they contain such covenants only as are justified by the custom of the country.

32. With respect to incumbrances, it remains to remark, that if a purchaser suspect any person has a claim on the estate which he has contracted to buy, he should inquire the fact of him, *at the *same time stating that he intends to purchase the estate*; and if the person of whom the inquiry is made has an incumbrance on the estate, and deny it, equity would not afterwards permit him to enforce his demand against the purchaser (r) (1).

33. The inquiry should be made before proper witnesses; and as a witness may refresh his memory by looking at any paper, if he can afterwards swear to the facts from his own memory, it seems advisable that the witness should take a note of what passes (s) (2).

34. Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed. Purchasers frequently take this step, under an impression, that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title (t), or would at least be a ground to leave it to a jury, to consider whether the party had not taken possession with an intention to waive all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in the particulars by which he purchased, upon his application was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waiver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a rea-

(r) *Idleston v. Rhodes*, 2 Vern. 554; Amy's case, 2 Cha. Ca. 128, cited; *Hickson v. Aylward*, 3 Molloy, 1.
(s) See *Doe v. Perkins*, 3 Term Rep. 749, and the cases there cited; *Burrough v. Martin*, 2 Camp. Ca. 112.

(t) See 3 P. Wms. 193; *Calcraft v. Roebuck*, 1 Ves. jun. 226; 12 Ves. jun. 27; and *Vancouver v. Bliss*, 11 Ves. jun. 464; Ex parte *Sidebotham*, 1 Mont. & Ayr. 655; 2 Mont. & Ayr. 146, vide *post*, ch. 8.

(1) See 1 Greenleaf's Cruise, 204, 205; Tit. XV. Mortgage, Ch. V. §§ 25, 26; *Lec v. Porter*, 5 John. Ch. 268; 1 Story Eq. Jur. §§ 384 et seq.; *Morse v. Child*, 7 N. Hamp. 521; *Platt v. Squire*, 12 Metcalf, 494; *Marston v. Brackett*, 9 N. Hamp. 351, Per Wilde J. in *Saunders v. Robinson*, 7 Metcalf, 315; *Bright v. Boyd*, 1 Story C. C. 478; *Allen v. Winston*, 1 Rand, 65.

(2) 1 Greenl. Ev. § 436, § 437, § 438; *Bunker v. Shad*, 8 Metcalf, 150; *Shove v. Wiley*, 18 Pick. 558.

sonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer (*u*).

35. If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may in most cases venture to do so, provided the vendor will sign a memorandum, importing that the possession taken by the purchaser, shall not be deemed a waiver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor, safely take possession of the estate at the time the contract is entered into, as he cannot be held to have waived objections, of which he was not *aware; and if the purchase cannot be completed on account of objections to the title, he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him (*x*).

36. A purchaser of any equitable right, of which immediate possession cannot be obtained, should, previously to completing his contract, inquire of the trustee, in whom the property is vested, whether it is liable to any incumbrance. If the trustee make a false representation, equity would compel him to make good the loss sustained by the purchaser, in consequence of the fraudulent statement (*y*). When the contract is completed, the purchaser should give notice of the sale to the trustee. The notice would certainly affect the conscience of the trustee, so as to make him liable in equity, should he convey the legal estate to any subsequent purchaser; and it would also give the purchaser a priority over any former purchaser or incumbrancer, who had neglected the same precaution (*z*).

37. Auctioneers usually prepare the particulars and conditions of sale; but this a vendor should not permit, as continual disputes arise from the mis-statements consequent upon their ignorance of the title to the estate.

38. Where an estate has been in a family for a long time, or the title has not been recently investigated, it will be advisable for the owner to have an abstract of his title submitted to counsel, and any objections which occur to it cleared up, previously to a contract

(*u*) *Burnell v. Brown*, 1 Jac. & Walk. 145; *Stevens v. Guppy*, 3 Russ. 171.
168; see *Southby v. Hutt*, 2 Myl. & Cra. 207.
(*y*) *Burrowes v. Lock*, 10 Ves. jun. 470.
(*x*) *Hearne v. Tomlin*, Peake's Ca. 192; see *Kirtland v. Pounsett*, 2 Taunt.
(*z*) Vide *infra*, ch. 22.

being entered into for sale of the estate. By this precaution, the vendor will prevent any delay on his part, which might impede the sale from being carried into effect by the time stipulated ; and will, in many cases, avoid the expense necessarily attending tedious discussions of a title. Another advantage is, that if there should be any defect in the title which cannot be cured, it would be known only to the agents and counsel of the vendor. It is of the utmost importance to keep defects in a title from the knowledge of persons not concerned for the owner. Persons concerned for purchasers, have in many instances communicated fatal defects in a vendor's title, to the person interested in taking advantage of them, by which titles have been disturbed.

*CHAPTER I.

OF SALES BY AUCTION AND PRIVATE CONTRACT.

SECTION I.

WHAT IS AN AUCTION.

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| 1. <i>What is an auction.</i> | 6. <i>Glass of liquor bidding.</i> |
| 3. <i>Dumb bidding.</i> | 7. <i>What a valid demand.</i> |
| 4. <i>Candlestick bidding.</i> | 9. <i>Auctioneer must sell.</i> |
| 5. <i>Marked paper bidding.</i> | 10. <i>Warranty by auctioneer.</i> |

THIS Chapter, in former editions, contained the law relating to the auction duty ; but as that is now repealed, it is necessary only to retain so many of the authorities as may still have a general application. It should be borne in mind that the decisions upon what constituted an auction, depended upon the auction duty acts.

1. The acts of Parliament, in directing every auctioneer to take out a license, extended that liability to every person exercising the trade of an auctioneer or seller by commission at any sale of any estate, goods, &c., by outcry, knocking down of hammer, by candle, by lot, by parcel, or by any mode of sale at auction, or whereby the highest bidder was deemed to be the purchaser (*a*) ; which description seemed to embrace all the modes of sale by auction upon which duty was imposed.

2. The acts applied to every mode of sale, whereby the highest bidder was deemed to be the purchaser. Therefore, where after an auction at which there was no bidding, the seller's agent stated that he should be ready to treat for the sale by private bargain, and the meeting broke up ; and the agent shortly afterwards went into a private room, with several of the persons who attended the sale, and he stated that the highest offer above 50,000 *l.* would be accepted ; and offers were accordingly made to him, and he having opened them, said that the one which was the highest *would be accepted, provided the terms of payment could be adjusted, and these terms having been adjusted, the bargain was concluded the*

(*a*) 19 Geo. III. c. 56, s. 3 ; 42 Geo. III. c. 93, s. 14.

**following day*; this was held to be within the act. The agent put himself under an obligation to treat with all the persons assembled, and to give the estate to the highest bidder. The question was not, whether this was what was usually called a sale by auction, but whether for the purpose of the act every thing must not be considered as such a sale where the contract was with various persons, with an engagement to let the highest bidder be the purchaser. He might have taken any individual he pleased and concluded a bargain with him; that would have been a transaction of a different kind: but here he treated with a number, and came under an engagement to accept the highest offer (*b*).

3. Any thing in the nature of a bidding was within the acts; and therefore where the owner put the price under a candlestick in the room (which is called a dumb bidding), and it was agreed that no bidding should avail if not equal to that, it was holden (*c*) to be within the acts; as being in effect an actual bidding of so much, for the purpose of superseding smaller biddings at the auction.

4. Upon such a sale by candlestick biddings, as they are denominated, where the several bidders do not know what the others have offered, a bidding of so much per cent. more than any other person had offered, was deemed binding on the person who made it (*d*).

5. So biddings by several persons of sums marked upon a paper were within the act (*e*).

6. So in the case of a female auctioneer who continued silent during the whole time of the sale, but whenever any one bid she gave him a glass of brandy: the sale broke up, and in a private room he that got the last glass of brandy was declared to be the purchaser. This was decided to be an auction (*f*).

7. If there were two owners, and one appointed a puffer unknown to the other or to the auctioneer, he would, if he were the last bidder, have been deemed the highest bidder within the common condition (*g*).

8. Although the condition were, that the highest bidder should immediately after the sale pay the auction duty, yet a demand after the day's sale was concluded was valid, notwithstanding that

(*b*) Walker v. Advocate-General, 1 Dow, 111.

(*c*) See the case cited, 3 East, 340. Capp v. Topham, *infra*.

(*d*) 3 Mer. 483, *per* Lord Eldon.

(*e*) Attorney-General v. Taylor, 13 Price, 636.

(*f*) 1 Dow, 115.

(*g*) Wilson v. Carey, 11 Mees. & Wils. 368.

the sale of the lot in question was followed by the sale of other unconnected lots (*h*).

*9. The auctioneer must himself sell the estate, and cannot without a special authority, delegate the sale to another (*i*).

[Yet this does not require that he should make all the sales in person. He may employ all necessary and proper clerks and servants. And in the course of a protracted sale, he may undoubtedly, without a violation of law, relieve himself by employing others to use the hammer and make the outcry. But this should be done under his immediate direction and supervision (*ii*).]

10. A statement by an auctioneer to the vendor or his agent, that he had done what was necessary to avoid payment of the duty, amounted to a warranty, although the duty became payable, not by the default, but by the ignorance or mistake of the auctioneer.

(*h*) S. C.

183; *Schmaling v. Thomlinson*, 6 Taunt.

(*i*) See *Cockran v. Irlam*, 2 Mau. & Selw. 301; *Cablin v. Bell*, 4 Camp. Ca.

147; *Coles v. Trecothick*, 9 Ves. jun. 251.

(*ii*) Per Morton J. in *Commonwealth v. Harnden*, 19 Pick. 482; *Chitty Contr.* (8th Am. ed.) 207 and cases in note.

SECTION II.

OF PUFFING.

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| <ol style="list-style-type: none"> 1. <i>Civil law.</i> 2. <i>Lord Mansfield against: Bexwell v. Christie.</i> 3. <i>Lord Kenyon against: Howard v. Castle.</i> 4. <i>Lord Rosslyn for: Conolly v. Parsons.</i> 5. <i>Lord Alcanley for: Bramley v. Alt.</i> 6. <i>Sir W. Grant for: Smith v. Clarke.</i> 8. <i>Later authorities against.</i> 9. <i>Result favorable.</i> 10, 17. <i>Public notice.</i> | <ol style="list-style-type: none"> 11. <i>Appointment to run up price, bad.</i> 12. <i>So appointment of more than one puffer.</i> 14. <i>Or where an implied condition against it.</i> 15. <i>Or sale is without reserve.</i> 16. <i>Effect on sub-purchaser.</i> 18. <i>Purchaser not to deter bidders.</i> 19. <i>Sale damaged by supposed puffers, not enforced.</i> 20. <i>Puffer bidding for the wrong estate not bound in equity.</i> |
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1. According to Cicero (*a*), a vendor ought not to appoint a puffer to raise the price, nor ought a purchaser to appoint a per-

(*a*) De Off. 1. 3.

son to depreciate the value of an estate intended to be sold (1). And Huber lays it down (b), that if a vendor employ a puffer he shall be compelled to sell the estate to the highest *bona fide* bidder; because it is against the faith of the agreement, by which it is stipulated that the highest bidder shall be the buyer (2).

2. In *Bexwell v. Christie* (c), Lord Mansfield and the other Judges of B. R. followed the rule of the civil law, and treated a *private* bidding, by or on the behalf of the vendor, as a fraud; but the Legislature, by the subsequent statutes imposing a duty on sales of estates by auction, seems to have been of a different opinion, and even to have sanctioned it. Lord Rosslyn, who was *present at the making of the act, remarked in the case of *Conolly v. Parsons*, that (d) the acts of Parliament go upon its being an usual thing and a fair thing for the owner to bid. The pressure, when the tax was imposed, was by embarrassing people, who chose to dispose of their goods by auction if they chose to be purchasers, by the tax falling upon them. He said, that he thought it would have occurred either to Lord Thurlow or to him, when the exception in favor of the owner was proposed, that the case would not exist, as the owner could not be a bidder; or that, for his attempting to do what he could not by law, it would be just that he should pay the duty. It was very wrong to the public to let that clause stand, if at the time it was understood that the owner bidding was doing an illegal thing. The acts did not require an open notice, but only a private notice to the auctioneer, and an oath to prevent the setting up a bidding for the owner that the bidder might evade paying the duty.

3. Lord Kenyon, however, in the case of *Howard v. Castle*, where the purchaser was the only real bidder, and there were several puffers (e), clearly coincided with Lord Mansfield's opinion; and held, that unless it was publicly known that the owner intended to bid, it was a fraud upon the purchaser, and consequently no action would lie against him for non-performance of his agreement. The acts of Parliament, he thought, did not intend to interfere with this point, but to leave the civil rights of mankind

(b) *Prælectiones*, xviii. 2. 7.

(c) H. 16 Geo. III. Cowp. 395.

(d) See 3 Ves. jun. 628.

(e) 36 Geo. III.; 6 Term Rep. 642.

See *Twining v. Morris*, 2 Bro. C. C. 326; Perkins' ed. 331 note b; and see 3 Term Rep. 93, 95.

(1) *Moncrief v. Goldsborough*, 4 Har. & M'Hen. 282; *Donaldson v. M'Roy*, 1 Browne, 346; *Smith v. Greenlee*, 2 Dev. 126; *Troughton v. Johnson*, 2 Haywood, 28.

(2) See the opinion of Ware J. in *Veazie v. Williams*, 3 Story C. C. 611, 632.

to be judged of as they were before. And Grose, J. also expressed his opinion, that the doctrine was not in the least impeached by the acts of Parliament.

4. But in the case of *Conolly v. Parsons* (f), Lord Rosslyn said, he fancied the foregoing case turned on the circumstance that there was no real bidder; and the person refused instantly. It was one of those trap auctions which are so frequent in this city. The reasoning went large, certainly, and did not at all convince him. He said, he should wish it to undergo a re-consideration: for if it was law, it would reduce every thing to a Dutch auction, by bidding downwards (I.) He felt vast difficulty to compass *the reasoning, that a person does not follow his own judgment because other persons bid; that the judgment of one person is deluded and influenced by the biddings of others. The facts of the case of *Conolly v. Parsons* do not appear in the report; but I learn, that there was a contest between real bidders, after the person employed to bid on the part of the vendors had desisted from bidding. The suit was compromised by the purchaser paying a considerable sum of money to the vendor to release him from the contract; and consequently Lord Rosslyn did not give judgment; but it seems he was clearly of opinion that the sale was valid.

5. And in the latter case of *Bramley v. Alt* (g), where an estate was put up to sale by public auction, and an agent for the vendor bid to 75*l.* an acre, without public notice of his intention to do so; and after a contest with real bidders the estate was bought at 101*l.* 17*s.* an acre: Lord Avonly, then Master of the Rolls, decreed a specific performance with costs. And he concurred with Lord Rosslyn in considering the case of *Howard v. Castle* only

(f) 3 Ves. jun. 625, n.

(g) 3 Ves. jun. 620. See Sumner's ed. note (a).

(I) A sale of this nature is thus conducted: The estate is put up at a high price, and if nobody accept the offer, a lower is named, and so the sum first required is gradually decreased, till some person close with the offer. Thus there is of necessity only one bidding for the estate, a mode of sale which, in this country, would attract few bidders. In some counties in England a singular mode of sale of estates for redemption of land-tax is adopted: the auctioneer states the sum of money wanted, and the number of acres to be disposed of, and the person who will accept the least quantity of land for the sum required, is declared the purchaser; so that the persons bid downwards, until some one name a quantity of land less than any other will take.

The manner of conducting sale by auction of the post-horse duties is at once Dutch and English. The duties are put at a large sum, named in the particulars, and the sale is then conducted in the same manner as a Dutch auction; but when any person actually bids, others may advance on that bidding, and the highest bidder is declared the purchaser; just as if the sale had been conducted in the usual way.

as a decision, that where all the bidders except the purchaser are puffers, the sale shall be void.

6. In a subsequent case (*h*), it appeared that assignees of a bankrupt had put up the estate to sale by auction. It was proved that a bidder was employed on their parts to bid up to, but not exceed 750*l.*, the sum for which the estate was actually sold. The Master of the Rolls held, that the assignees had not committed any fraud, they did not employ the bidder for the purpose, generally, of enhancing the price, but merely to prevent a sale at an undervalue, and they stated previously, what they conceived to be the true value, below which the lot ought not to be sold. He treated the case of *Howard v. Castle* as having proceeded on the ground of plain and direct fraud, and said, that in a similar case he should come to a similar conclusion.

7. By these decisions, therefore, it was ruled, that a bidder may be privately appointed by the owner in order to prevent the estate from being sold at an undervalue; and that if there were real *bidders at a sale, it must be supported, although the bidding immediately preceding that of the purchaser was a fictitious one (*i*).

8. But Lord Tenterden again opened the question at *nisi prius*, and expressed extrajudicially the strong inclination of his opinion, that if a person be employed with a view to save the auction duty (*l*), the sale is void, unless it be announced that there is a person bidding for the owner; the act itself is fraudulent. The statute was made for a different purpose, with a view to the duty only, and could not be made to sanction what was in itself fraudulent (*k*). And in a late case, *C. B. Alexander* treated it as clear, that the employment of a puffer vitiated the sale (*l*), but it was not necessary to decide that point. And in *Crowder v. Austin* (a horse cause), after a *bona fide* bidding of 12*l.* the owner's servant made repeated biddings up to 23*l.* That appears to have been a mere fraud, but the court is reported to have been inclined to adhere to Lord Mansfield's opinion in *Bexwell v. Christie* (*m*).

(*h*) *Smith v. Clarke*, 12 Ves. jun. 477.

(*i*) *Smith v. Clarke*, 12 Ves. jun. 477. See Sumner's ed. note (*a*).

(*k*) *Wheeler v. Collier*, 1 Camp. Ca. 123.

(*l*) *Rex v. Marsh*, 3 You. & Jerv. 231,

vide post. This was rather a mis-statement of the rule than a judicial opinion against it.

(*m*) 3 Bing. 368.

(*l*) The appointment is with a view to prevent the estate from going below a fixed sum; or, in some cases, to run up the price fraudulently. The auction duty was saved by giving a proper notice.

9. The authorities, however, preponderate in favor of the validity of a person privately bidding, and the practice is universally adopted, and ought not to be lightly disturbed. It would require a decision of the House of Lords to overrule the decisions, and it would be better to leave them undisturbed, restricted as the power now is (1).

10. Where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other (*n*). Consistently with the above authorities, the rule, it should seem, would be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest.

11. But where a person is employed, not for the defensive precaution, with a view to prevent a sale at an under value, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud (*o*).

12. Neither do the cases authorize the vendor to appoint more *than one person on his behalf. It seems highly proper that a vendor should be permitted to appoint a person to *guard* his interests against the intrigues of bidders: but it does not follow that he may appoint more than one. The only possible object of such a proceeding is fraud. It is simply a mock-auction; and, notwithstanding Lord Roslyn's impression, it is universally felt and acknowledged, that the judgments of most men are deluded and influenced by the biddings of others; and if a man believe the other bidders to be real ones, he advances under the apprehension that he shall let slip the opportunity of buying. As far as any aid was sought from the auction-duty acts, in support of private biddings on behalf of the owner, it was clear that they did not authorize or sanction the appointment of more than one person. In the report of *Conolly v. Parsons* it is stated, that *persons* were employed to bid, and did bid for the vendors; but the fact is, that one person only was employed by them, and actually bid on their behalf. The Master of the Rolls observed, in the late case of

(*n*) *Bowles v. Round*, 5 Ves. jun. 508. Sumner's ed. note (*b*).

(*o*) See 12 Ves. jun. 183. In *Fitzgerald v. Forster*, 31st July 1813, the Vice-

Chancellor seemed rather to be of opinion that the appointment of one puffer was, in no case, bad. *Crowder v. Austin*, 3 Bing. 368.

(1) See *Latham v. Morrow*, 6 B. Monroe, 630; *National Fire Ins. Co. v. Loomis*, 11 Paige, 431.

Smith v. Clarke, that he did not see, that if several bidders were employed by the vendor, in that case a court of equity would compel the purchaser to carry the agreement into execution; for that must be done merely to enhance the price. It was not necessary for the defensive purpose of protection against a sale at an undervalue (*p*) (1).

13. In a later case upon this subject, Lord Tenterden held clearly that the sale was void in point of law, as two persons had been employed to bid, although they were both limited not to go beyond the same fixed sum. The current authority, therefore, is clearly against the validity of such a sale (*q*).

14. In a late case upon a sale by the Crown of an estate seized under an extent, it was stipulated, that "on the part of the Crown, Mr. E. Driver should be at liberty to make one bidding, but no more, and if the highest bidder, the sale to be void;" and a puffer was employed at the auction by Mr. Driver, the agent for the Crown; the court held that the sale was not binding upon the purchaser (*r*). We cannot fail to perceive that in this last case the condition was pregnant with a negative, that no puffer should be employed. Mr. Driver was there, not simply as the auctioneer, but as the known person to protect at any moment the estate by his bidding; the other person was merely a puffer, to give to the *sale the appearance of a contest; a real bidder must have been misled by the conditions (2).

(*p*) See 12 Ves. jun. 483; and see 8 Term Rep. 93. 95.

(*q*) *Wheeler v. Collier*, 1 Mood. & Malk. 123.

(*r*) *Rex v. Marsh*, 3 You. & Jer. 331; and see *Crowder v. Austin*, 3 Bing. 368,

11 Moo. 283.

(1) Mr. Justice Story, in *Veazie v. Williams*, 3 Story C. C. 622, 623, quotes largely from Sir William Grant's judgment in the above case of *Smith v. Clarke*, and highly commends the suggestions there made.

(2) Mr. Chancellor Kent, in his learned Commentaries, having noticed and commented on the cases of *Bexwell v. Christie*, *Howard v. Castle*, *Conolly v. Parsons*, *Bramley v. Alt*, and *Smith v. Clarke*, says:—"It would seem to be the conclusion, from the later cases, that the employment of a bidder by the owner would or would not be a fraud, according to the circumstances tending to show innocence of intention, or a fraudulent design. If he was employed *bona fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. So it would be a void sale, if the purchaser prevails on the persons attending the sale to desist from bidding, by reason of suggestions by way of appeal to the sympathies of the company." 2 Kent, (5th ed.) 538. 539. And Mr. Justice Story, in *Veazie v. Williams*, 3 Story C. C. 623, approves of the above remarks and suggests that they furnish "the true and just

15. Where the particulars or advertisements state that the estate is to be sold *without reserve*, the sale will be void against a purchaser, if any person be employed as a puffer, and actually bid at the sale. This was decided in the case of *Meadows v. Tanner* (s). The Vice-Chancellor said, that the plain meaning of the words *without reserve*, in a particular of sale, is, that no person will be employed to bid on behalf of the vendor for the purpose of keeping up the price; and that the vendor could have no claim to the aid of a Court of Equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

16. Although an original purchaser will not be bound where a

(s) 5 Madd. 34.

and satisfactory results." In the above case of *Veazie v. Williams*, Mr. Justice Story further observes:—"It appears to me, that there is room for some distinctions upon this subject, which, if they do not fully reconcile the cases, are, at all events, well adapted to subserve the purposes of private justice and convenience, as well as public policy. Where all the bidders at the sale, except the purchaser, are secretly employed by the seller, and yet are apparently real bidders, and the purchaser is misled thereby, and is induced to give a larger price in consequence of their supposed honesty and exercise of judgment, then the sale ought to be held a fraud upon the purchaser, because he has been intentionally deluded by them. But where there are real bidders, as well as secret bidders for the sellers, these, if the last bid before the purchaser's bid be a real bid, and no intentional deceit has been practiced by what have been sometimes called decoy ducks, to mislead or surprise the judgment or discretion either of other real bidders or of the purchaser, there seems to be a solid ground to hold that the sale is valid." See also *Wolfe v. Lyster*, 1 Hall, (N. York) 146; *Morehead v. Hunt*, 1 *Devereux & Bat. Eq. Rep.* 35; *Woods v. Hall*, ib. 411; *Steele v. Ellmaker*, 11 *Serg. & Rawle*, 86; *Chitty Contr.* (8th Am. ed.) 298, 692, and in notes; *Moncrief v. Goldsborough*, 4 *Harr. & M'Hen.* 282; *Troughton v. Johnson*, 2 *Hayw.* 28; *Phippen v. Stickney*, 3 *Metcalf*, 386, 387; *Latham v. Morrow*, 8 *B. Monroe*, 630; *National Fire Ins. Co. v. Loomis*, 11 *Paige*, 431; *Jenkins v. Hogg*, 2 *Const. Rep.* 821.

Mr. Chancellor Kent, however, notwithstanding the conclusion above stated by him as the result of the cases, declares that "the original doctrine of the King's Bench is the more just and salutary doctrine. In sound policy, no person ought in any case, to be employed secretly to bid for the owner against the *bona fide* bidder at a public auction. It is fraud in law on the very face of the transaction; and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of sale; and such a doctrine has been recently declared at Westminster hall. *Crowder v. Austin*, 3 *Bingh.* 368. The language of the Supreme Court of Louisiana is strongly in favor of the doctrine of Lord Mansfield. *Baham v. Bach*, 13 *Louisiana Rep.* 287." See also the learned dissenting opinion of Mr. Justice Ware, in the case of *Veazie v. Williams*, 3 *Story C. C.* 632. In this case of *Veazie v. Williams*, it appeared that false bids had been made, but by the auctioneer, who had no authority to make them from the seller. Upon this Mr. Justice Story said,—“Be the general doctrine upon this subject as it may, no case has fallen under my notice, in which it has been held, that the act of the auctioneer in receiving, or making false bids, unknown and unauthorized by the seller, would avoid the sale. And upon principle, it is very difficult to see why it should avoid the sale, since there is no fraud, connivance, or aid given by the seller to the false bids. If the purchaser is misled by the false bids of the auctioneer to suppose them to be real, he may have an action against the auctioneer for the injury sustained thereby.”

fraud has been practiced in the biddings, yet if he transfer his contract, a strong case of fraud must be made out against the original purchaser, to enable the court to give the benefit of it to his assignee, who was not induced through competition to give the price (*t*).

17. Where public notice is given, the mode least liable to objection seems to be that of reserving a bidding, or stipulating in the conditions of sale, that the owner may bid once in the course of sale (*u*). It may here, however, be proper to observe, that buying in an estate, especially where it is done without public notice, mostly prejudices a future sale. This was exemplified, in the sale of an estate before one of the Masters in Chancery, where 23,000*l.* was *bona fide* bid, and the estate was bought in by the agent of the vendor; afterwards there were three other sales in the Master's office; and the consequence of the estate having been bought in deterring others from bidding, was, that on the two first occasions no more was offered than 12,000*l.* and 6,000*l.*; and the estate finally sold for 15,000*l.* (*x*).

18. As on the one hand a seller cannot appoint puffers to delude the purchaser, so on the other, if a purchaser by his conduct deter other persons from bidding, the sale will not be binding (*1*). Thus, where upon a sale by auction of a barge, a bidder addressed the company present, saying he had a claim against the late owner, by whom he said he had been ill used, whereupon no one offered to bid against him: but the auctioneer refusing to knock down *the property to a single bidding, a friend of the bidder's bade a guinea more, and the first bidder then made a second and higher bidding, amounting, however, to only one-fourth of the prime cost of the barge; it was held that there was no legal sale (*y*) (*2*).

(*t*) See 12 Ves. jun. 484.

Kirton, 8 Ves. jun. 502; and see *Twin-*
ing v. Morris, 2 Bro. C. C. 326.

(*u*) See Cowp. 397; *Jervoise v. Clarke*,
1 Jac. & Walk. 389.

(*y*) *Fuller v. Abrahams*, 3 Brod. &

(*x*) See 6 Ves. jun. 629; *Wren v. Bing*, 116; 6 Moo. 316.

(1) *Woods v. Hudson*, 5 Munf. 423; *Hudson v. Hudson*, 5 Munf. 159; *Troup v. Wood*, 4 John. Ch. 228, 254.

(2) 2 Kent, (5th ed.) 539, and note; *Hamilton v. Hamilton*, 2 Richardson Eq. 355; *Gardiner v. Morse*, 25 Maine, 140; *Haynes v. Crutchfield*, 7 Alabama, 189.

The Supreme Court of New York have held, in several cases, that contracts by which one party stipulated not to bid against another at an auction sale, or an agreement by one to bid for the benefit of himself and another party, could not be enforced in a court of law. The decisions have been usually placed upon two grounds; 1st, that such a contract was *nudum pactum*, being without consideration; 2d, that it was against public policy and a fraud on the vendor. *Jones v. Caswell*, 3 John. Cas. 29; *Doolin v. Ward*, 6 John. 194; *Wilbur v. How*, 8 John. 444; *Thompson v. Davies*, 13 John. 42. The same doctrine was held in *Dudley v. Little*, 2 Ham. (Ohio) 505; and in *Piatt v. Oliver*, 1 McLean, 295.

19. And where the seller's known agent bid at the sale for the purchaser, and was considered as a puffer, which deterred other bidders, a specific performance was refused (*z*); so even where a real purchaser was considered as a puffer, and the actual puffer neglected to bid the appointed sum, the court refused to interfere (*a*).

20. These instances are in favor of the *seller*. Where a puffer by mistake bid for the wrong estate, which was knocked down to him, equity left the seller to his remedy at law (*b*).

(*z*) *Twining v. Morris*, 2 Bro. C. C. 326, see *post*, ch. 4, s. 3.

(*a*) *Mason v. Armitage*, 13 Ves. jun. 25, *post*, ch. 4, s. 3.

(*b*) *Mallins v. Freeman*, 2 Kee. 25.

See also *Gulick v. Ward*, 5 Halsted, 87. On the other hand, in *Smith v. Greenlee*, 2 Devereux, 126, the Court of North Carolina, while they sustain the general doctrine, that a sale might be avoided when made to one in behalf of an association of bidders designed to stifle competition, yet concede that this rule would not apply to an association of bidders formed for honest and just purposes, as in the case of a union of several persons formed on account of the magnitude of the sale, or where the quantity offered to a single bidder exceeded the amount which individuals might wish to purchase on their own account. And in *Phippen v. Stickney*, 3 Metcalf, 388, 389, Mr. Justice Dewey, delivering the opinion of the court, said:—"We are of opinion, that an agreement between A. & B. that A. will permit B. to become the purchaser of certain property about to be offered for sale at public auction, and that A. will participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale, below the fair market value, it will be illegal, and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding." See also *Small v. Jones*, 1 Watts & Serg. 128; *Switzer v. Skiles*, 3 Gilman, 529. In *Gardiner v. Morse*, 25 Maine, 140, the Supreme Court of Maine approved of the above rules laid down in the case of *Phippen v. Stickney*, and in that case decided that, where the parties agreed, that if the defendant, at an auction sale of the effects of a bankrupt, would not bid upon a note against the plaintiff, which was a part of said effects, the plaintiff would discharge a demand he held against the defendant, such agreement was unlawful and void. *Gardiner v. Morse*, 25 Maine, 140.

SECTION III.

OF THE PARTICULARS AND CONDITIONS OF SALE.

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|---|---|
| 1. <i>Bidding may be countermanded.</i> | 42. <i>Does not extend to fraudulent description.</i> |
| 2. <i>Condition against it.</i> | 43. <i>Equitable doctrine thereon.</i> |
| 6. <i>Sale under Act of Parliament.</i> | 44. <i>Nor to want of title to material part.</i> |
| 7. <i>Conditions favorably construed.</i> | 49. <i>Nor to unintentional error where purchaser misled.</i> |
| 8. <i>Where purchaser tenant at will only.</i> | 52. <i>Or the value cannot be estimated.</i> |
| 10. <i>Cannot be contradicted at sale.</i> | 55, 58. <i>Effect, generally, of error not fraudulent upon the condition.</i> |
| 16. <i>Purchaser bound by previous knowledge.</i> | 59. <i>Timber.</i> |
| 17. <i>Good title implied: all interest included.</i> | 61. <i>Timber-like trees to be paid for.</i> |
| 18. <i>Condition to take a defective title.</i> | 62. <i>Fixtures.</i> |
| 21. <i>Condition to avoid sale if title defective.</i> | 63. <i>Deeds not to be produced.</i> |
| 22. <i>Effect of condition to rescind sale.</i> | 64. <i>Assignments of terms, &c.</i> |
| 23. <i>Description of estate.</i> | 65. <i>*Attested copies.</i> |
| 25, 37. <i>Free public-house.</i> | 66. <i>Landlord's title.</i> |
| 26. <i>Rights of way.</i> | 67. <i>Liability of purchaser of leaseholds.</i> |
| 27. <i>Plan of new street.</i> | 71. <i>Preparation of conveyance.</i> |
| 28. <i>Lights.</i> | 72. <i>Forfeiture of deposit and right to re-sell.</i> |
| 30. <i>Reading of lease at auction.</i> | 73. <i>Stipulated damages.</i> |
| 31. <i>Buildings removed.</i> | 74. <i>Forfeiture of deposit under condition.</i> |
| 32. <i>Evidence of identity.</i> | 76. <i>Where there is no such condition.</i> |
| 33. <i>Covenant against trades.</i> | 77. <i>Re-sale after bankruptcy.</i> |
| 34. <i>Clear yearly rent.</i> | 78. <i>Seller's lien.</i> |
| 36. <i>Covenants in lease.</i> | 79. <i>Time allowed to purchaser.</i> |
| 39. <i>Waterloo Bridge annuity: power to redeem not stated.</i> | 81. <i>Unusual conditions.</i> |
| 40. <i>Power of purchase not stated.</i> | 83. <i>Agreements to be signed.</i> |
| 41. <i>Condition that misdescription not to avoid sale.</i> | 84. <i>Auctioneer may bind purchaser and seller.</i> |

The particulars and conditions of sale (*a*) next claim our attention.

1. A bidding at a sale by auction may be countermanded at any time before the lot is actually knocked down (*b*) (1); because the assent of both parties is necessary to make the contract binding; that is signified, on the part of the seller, by knocking down the

(*a*) See a form of them, App. No. 1. Moo. & Pay. 717. As to goods, see

(*b*) *Payne v. Cave*, 3 Term Rep. 148; *Phillips v. Bistolli*, 3 Dowl. & Ry. 822. see *Routledge v. Grant*, 4 Bing. 653; 1

(1) See *Downing v. Brown, Hardin*, 181.

hammer. An auction is not unaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. If a bidding was binding on the bidder before the hammer is down, he would be bound by his offer, and the vendor would not, which can never be allowed.

2. The countermand of a bidding would, in some cases, prove of the most serious consequences; and it might therefore be advisable to stipulate in the conditions of sale, that no persons shall retract their biddings.

3. If the bidding be retracted, the retractation must be made loud enough to be heard by the auctioneer, otherwise it amounts to nothing, and is the same as a thought confined to the person's own breast (*c*).

4. This condition was originally suggested to me by the case of *Payne v. Cave*, and it has now become a common condition. But I always thought it one that could not be enforced. In *Jones v. Nanney* (*d*), Mr. Baron Wood suggested the difficulties, that to hold that an action would lie on an implied undertaking not to retract would be an invasion of the statute of frauds, and he asked whether, if there had been an express condition of sale, that the statute of frauds should have no operation on the transaction between the parties, it could be contended to be an efficient condition so as to avoid the statute.

*5. Although the duty was, by the acts, imposed on the vendor, yet he was not restrained from making it a condition of sale, that the duty, or any certain portion thereof, should be paid by the purchaser over and above the price bidden at the sale by auction: and in such case the auctioneer was required to demand payment of the duty from the purchaser, or such portion thereof as was payable by him under the condition: and, upon neglect or refusal to pay the same, such bidding was declared by the act to be null and void to all intents and purposes (*e*). But it was properly held that the nonpayment made the contract void only at the option of the vendor. The object of the provision was to protect the revenue, and that, it was observed, would be sufficiently accomplished by this construction (*f*). The rule thus established is one of general application.

(*c*) *Jones v. Nanney*, 10 Cl. & F. 39; 13 Price, 102, 103.

(*d*) 13 Price, 99.

(*e*) 17 Geo. 3, c. 50, s. 8. See 7 Ves. jun. 345.

(*f*) *Malins v. Freeman*, 4 Bing. N. C. 395; 6 Scott, 187; *Willson v. Carey*, 10 Mees. & Wels. 641.

6. Although trustees sell under an Act of Parliament which prescribes that after certain acts the last bidder is to be the purchaser, yet the trustees, as between them and the bidders, may superadd other conditions (*g*.)

7. The Judges will so construe conditions of sale as to endeavor to collect the meaning of the parties, without encumbering themselves with the technical meaning of the words.

Thus where (*h*) the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated that the purchaser should pay a certain *rent* before the lease was granted, which he accordingly agreed to do, the Court of King's Bench held that although the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Lord Kenyon said, he had always admired an expression of Lord Hardwicke's, "that there is no magic in words." But under an agreement for purchase, with a stipulation, that until the conveyance is made the purchaser shall pay and allow to the seller at the rate of a fixed sum per annum, three half-yearly payments will create the relation of landlord and tenant, and the sum payable will be recoverable as rent (*i*).

8. But it has been considered that in the case of *Saunders v. Musgrave* there was a clear intention to create a tenancy at a fixed annual rent. And therefore where, in an agreement for purchase with *possession, it was stipulated that the purchaser should pay interest at five per cent. per annum on the purchase-money until the completion of the contract, the purchaser, although he had built upon the land, was treated as tenant at will only, and the other was allowed to maintain an ejectment without notice to quit. The provision for payment of interest was not, it was said, by way of compensation for the occupation, but was quite independent of it (*k*).

9. Great care should be taken to make the particulars and conditions accurate; for the auctioneer cannot contradict them at the time of sale; such verbal declarations, — the babble of the auction-room, as Lord Eldon termed them (*l*) — being inadmissible as evidence (1).

(*g*) *Levy v. Pendergrass*, 2 Beav. 415.

(*h*) *City of London v. Dias*, Woodfall's L. & T. 301.

(*i*) *Saunders v. Musgrave*, 6 Barn. &

Cres. 524; 9 Dowl. & R. 529.

(*k*) *Doe v. Chamberlain*, 5 Mee. & Wels. 14.

(*l*) See 1 Jac. & Walk. 639.

(1) See *Wright v. DeKlyne*, Peters C. C. 199; *Grantland v. Wright*, 2 Munf. 179; *Rankin v. Matthews*, 7 Iredell, 286.

10. Thus, where estates were put up to sale by auction (*m*), and in the printed particulars of sale were stated to *be free from all incumbrance*, they were bought by a person who, discovering that there was a charge on the estate of 17*l.* per annum, refused to complete the purchase, in consequence of which, an action was brought by the vendor; and although he offered to give in evidence, that the auctioneer had publicly declared from his pulpit in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the court of C. B. refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was nonsuited. And this rule prevails in favor as well of the seller as of the purchaser (*n*), and it equally applies to a sub-sale; therefore, if *A* buy at sale after a formal explanation at the sale, which was heard by *B*, and then re-sell to *B*, the first declaration is no more binding upon *B* than *A*, and therefore *A* cannot enforce the contract, as explained by the auctioneer, against *B* (*o*).

11. The same rule of course prevails in equity, where the person setting up the parol evidence is plaintiff. Upon the sale of an estate by auction the particular was equivocal as to the words; but it was clear the purchaser was to pay for timber and timber-like trees. There was a large underwood upon the estate. At the sale, the article being ambiguous, the auctioneer declared he was only to sell the land; and every thing growing upon the land must be paid for. The *defendant*, the purchaser, insisted he was only to pay for timber and timber-like trees, not for plantation *and underwood. The declaration at the sale was distinctly proved; but it was determined by the Court of Exchequer that the parol evidence was not admissible. (*p*) (1).

12. Nor when the seller is plaintiff can parol evidence be admitted on his behalf, of the declarations at the sale, although the purchaser, by the written agreement, bind himself to abide by *the conditions and declarations made at the sale* (*q*).

(*m*) *Gunnis v. Erhart*, 1 H. Black. 289; see *Jones v. Edney*, 3 Camp. Ca. 285, 286; *Bradshaw v. Bennett*, 5 Carr. & Pay. 48.

(*n*) *Powell v. Edmunds*, 12 East, 6.

(*o*) *Shelton v. Livins*, 2 Crompt. & Jer. 411.

(*p*) *Jenkinson v. Pepys*, 6 Ves. jun. 330, cited; 15 Ves. jun. 521, stated.

(*q*) *Higginson v. Clowes*, 15 Ves. jun. 515, *vide infra*.

(1) See *Cannon v. Mitchell*, 2 Desaus., 320.

13. So if the particulars of sale state the estate to be held for three lives, but one drop before the sale, and the auctioneer state the fact, evidence of his statement cannot be received (*r*). The Court observed, that before the sale, the auctioneer ought to have altered the particulars with respect to the lives so as to have made them conformable to the fact.

14. But a question has been raised, whether, if by a collateral representation a party be induced to enter into a written agreement, different from such representation, he may not have an action on the case for the fraud practiced to lay asleep his prudence (*s*).

15. And if in truth the party do not purchase under the conditions of sale, although he bid at the auction, the conditions are not binding upon him: as where, before the sale of goods, an executor agreed that a legatee might bid at the auction to the amount of his legacy, and set off the purchase-money to that extent; it was held that the legatee so becoming a purchaser was not bound by the condition of sale requiring every purchaser to pay his purchase-money (*t*).

16. And if the purchaser have particular personal information given him of an incumbrance, or of the nature of the title, it seems that the parol evidence may be admitted (*u*). It may therefore be proved that the purchaser perused the original lease before the sale (*x*), as that does not contradict the particulars of sale; but after such evidence is received, it would be difficult to act upon it at law, against a direct statement in the particulars that is to bind the purchaser to the knowledge of a fact contrary to the written statement. For the reading the lease at an auction by the auctioneer is no excuse for a misdescription of the terms of the *lease in the particulars of sale (*y*). Such evidence may be used in equity as a *defence* against the specific performance, if the parol variation was in favor of the defendant, and the plaintiff seek a performance in specie according to the written agreement (*z*).

17. It should be borne in mind that in contracts for the sale of real estate, an agreement to make a good title is always implied,

(*r*) *Bradshaw v. Bennett*, 5 Carr. & Payn. 48.

(*s*) See *Powell v. Edmunds*, 12 East, 6.

(*t*) *Bartlett v. Purnell*, 4 Adol. & Ell. 792; a case of goods, the seller was plaintiff.

(*u*) *Gunnis v. Erhart*, 1 H. Black. 289; and see *Pember v. Mathers*, 1 Bro. C. C.

52; *Fife v. Clayton*, 13 Ves. jun. 546, where the particular was altered before the sale. *Ogilvie v. Foljambe*, 3 Mer. 53.

(*x*) *Bradshaw v. Bennett*, 5 Carr. & Payn. 48.

(*y*) See 1 Bing. N. C. 379.

(*z*) *Higginson v. Clowes*, *ubi sup*.

unless the liability is expressly excluded (*a*). And an agreement generally to sell, not expressing the interest in the subject, includes all the vendor's interest (*b*).

18. A condition upon a sale by assignees who had a defective title, that the purchaser should have an assignment of the bankrupt's interest under such title as he lately held the same, an abstract of which might be seen, was held to be a sale only of such title as the assignees had (*c*).

19. But the mere statement in a condition that the seller shall deliver up certain deeds, which are all the title-deeds in his possession, will not prevent the purchaser from requiring a good title (*d*).

20. If it be the custom in a public auction-room to paste up the conditions of sale in the room, and the auctioneer announce that the conditions are as usual, they will, if pasted up according to the usual custom, be binding on the purchaser, although he did not see them (*e*). This can seldom, however, happen upon a sale of estates.

21. The late Mr. Bradley recommended, that where it is understood, at the time of sale, that the vendor has only a doubtful title, a provisional clause, to the following effect, should be inserted in the conditions of sale and articles of purchase; which would be sufficient, he thought, to obviate any doubt that might otherwise arise at the sale:

“That if the counsel of the purchaser shall, on the examination of the title, be of opinion that a good title and conveyance cannot be made of the purchased premises within the time limited by the articles for carrying the same into execution; in that case, the same articles shall be discharged, and not further proceeded in on either side.”

22. A stipulation in a contract, that in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void if the seller *cannot*

(*a*) See 1 Mees. & Wels. 701.

(*d*) Dick v. Donald, 1 Bligh, N. S. 655.

(*b*) Bower v. Cooper, 2 Hare, 408.

(*c*) Mesnard v. Aldridge, 3 Esp. Ca.

(*e*) Freme v. Wright, 4 Madd. 364; 271; Bywater v. Richardson, 1 Adol. & Ell. 508.

post, ch. 8. See also Molloy v. Sterne, 1 Dru. & Walsh, 585, *et qu.*

make a title; but it is not sufficient for him to *say* that he cannot (*f*). And where the seller reserves a power to rescind the contract instead of answering objections to the title, yet if he once elect to answer, he is precluded from afterwards rescinding the contract (*g*); and the same rule would apply where the condition limits the purchaser's right to make objections (*h*). The seller, of course, would not be permitted to deliver a false abstract in order to enable him to avoid the contract; and if he insist that he has that right to rescind the contract, he cannot at the same time retain the deposit (*i*).

23. The estate cannot be too minutely described in the particulars; for although, as Lord Thurlow observed, it is impossible that all the little particulars relative to the quantity, the situation, &c. should be so specifically laid down as not to call for some allowance and consideration, when the bargain comes to be executed (*k*); yet if a person, however unacquainted in the actual situation of his estate, will give a description, he must be bound by that, whether consonant of it or not (*l*).

24. Lord Ellenborough has observed, that a little more fairness on the part of auctioneers, in the forming of their particulars, would avoid many inconveniences. There is always either a suppression of the fair description of the premises, or there is something stated which does not belong to them; and in favor of justice, considering how little knowledge the parties have of the thing sold, much more particularity and fairness might be expected. The particulars, he added, are in truth like the description in a policy of insurance, and the buyer knows nothing but what the party communicates (*m*).

25. In one case (*n*) the conditions of sale stated a house to be "a free public-house." The lease contained a covenant to take beer from the lessors; the auctioneer read over the whole lease in the hearing of the bidders, but he stated erroneously that the covenant had been decided to be bad. The purchaser brought an

(*f*) *Roberts v. Wyatt*, 2 Tau. 268; *Rippingall v. Lloyd*, 2 Nev. & Mann. 410; *Page v. Adam*, 4 Beav. 269, *post*, vol. 2.

(*g*) *Tanner v. Smith*, 10 Sim. 410; *Morley v. Cook*, 2 Hare, 106.

(*h*) *Cutts v. Thordey*, 13 Sim. 206.

(*i*) See 2 Hare, 111, 110.

(*k*) See 1 Ves. jun. 224, *per* Lord Thurlow.

(*l*) See 1 Ves. jun. 213, *per* Lord

Thurlow; *Schneider v. Heath*, 3 Camp. Ca. 506. See ch. 7, s. 3, 4, *infra*. [*Jackson v. Mass*, 11 John. 525; *M'Ferran v. Taylor*, 3 Cranch, 70; *State v. Gaillard*, 2 Bay, 11.]

(*m*) See 3 Smith, 439; and see *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337, and *post*. *Waring v. Hoggart*, 1 Ry. & Mood. 39.

(*n*) *Jones v. Edney*, 3 Camp. Ca. 284; *Flight v. Booth*, 1 Bing. N. S. 370.

action to recover his deposit. Lord Ellenborough said that in the conditions of sale this is stated to be "a free public-house." Had the auctioneer afterwards verbally contradicted this, he should have paid very little attention to what he said from his pulpit. Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction-room. But here the auctioneer, at the time of the sale, declared that he warranted and sold this a free public-house. Under these circumstances, a bidder was not bound to attend to the clauses of the lease, or to consider their legal operation.

26. Where (o) a lot was described on a plan with others, and the particulars stated that this lot was to be subject to the same rights of way and passage, and other rights and easements over the same, as were then enjoyed under the existing leases of the Crescent houses, it was held, that the sale was not binding upon the purchaser, because a way over the lot did exist for the Crescent houses; but a reference to the other part of the particulars, so far from throwing any light upon the existence of the way, tended to mislead the bidder at the auction; for the description of the Crescent houses noticed a right of way over another part of the estate, but not this right of way; and although the plan was referred to, it contained no trace of any right of way over this lot for the use of the Crescent houses, except a carriage sweep, for which provision was made. There was a way over the lot for the use of another lot, clearly marked upon the plan, and the presence of this was considered to add strength to the conclusion that none other was intended to be reserved. The description referred to of the Crescent houses, stated that the lease of one of them might be seen at the attorney's office, and would be produced at the sale.

But the court was of opinion that the exception of the rights and easements in this particular lot, and the above reference to the lease, did not impose an obligation on the bidder to refer to the lease itself. Whatever might have been the case, if the particulars had been confined to matter of description only, the court thought that as there was a direct reference and appeal to the plan, and the plan, whilst it disclosed one way, altogether omitted any trace of the way in question, the bidder at the auction could not be bound, in the exercise of ordinary prudence and vigilance, to look further; that the inspection of the plan would lull all suspicion to sleep, and that it was calculated not simply to give no information,

*but actually to mislead. Particulars and plans of this nature should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction, and they would only become a snare to the purchaser, if, after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand or attend to. The existence of the way was not sufficiently disclosed to make it clear to persons of ordinary vigilance and caution, and the contract was not binding upon the bidder.

27. The mere exhibition of the plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan, where the written contract is silent on that head (*p*) (1).

28. If a house be sold with all the lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, a right so to build should be expressly reserved: it will not do to describe the house as abutting on building ground belonging to the seller (*q*) (2).

29. Where there is a dispute between two purchasers at a sale, who have obtained their conveyances, as to which a wall, for example, belongs, a handbill advertising the properties for sale, which was circulated in the sale-room before and at the time of sale, and was seen by the party against whom it is sought to be used, or his agent who bought for him, is admissible in evidence to prove that the wall was reputed to belong to the property of the other purchaser (*r*).

30. The reading the lease at the auction by the auctioneer, is, as we have seen, no excuse for a misdescription of the terms of the lease in the particulars of sale (*s*).

31. And where a lease is sold by auction, the purchaser is not

(*p*) *Fooffees of Heriot's Hospital v. Gibson*, 2 Dow. 301; see *Compton v. Richards*, 1 Price, 27; *Beaumont v. Dukes*, Jac. 422; *Blanchard v. Bridges*, 4 Adol. & Ell. 176; *Squire v. Campbell*, 1 Myl. & Kee. 459; *Schreiber v. Creed*, 10 Sim. 9.

(*q*) *Swanborough v. Coventry*, 9 Bing. 305; 2 Moo. & S. 362.

(*r*) *Murley v. McDermott*, 3 Nev. & Per. 356; 8 Adol. & Ell. 138.

(*s*) 1 Bing. N. C. 379; *Jones v. Edney*, *supra*, p. 25; see *Paterson v. Long*, 6 Beav. 590.

(1) But if land is conveyed as bounded on a way upon one side, this is not merely a description, but an implied covenant that there is such a way. *Parker v. Smith*, 17 Mass. 413.

(2) *Story v. Odin*, 12 Mass. 157; 3 Kent, (6th ed.) 448; *Palmer v. Fletcher*, 1 Levis, 122.

bound to complete his purchase if any part of the buildings demised have been removed, although he heard the lease read, and the particulars did not comprise the building in question (t).

32. Although it be stipulated that no further evidence of identity of parcels shall be required, yet such proof may be required, if the *descriptions in the title deed differ from each other, and from the particulars of sale (u).

33. And in a case where the original lease contained a power of re-entry if certain trades were carried on upon the property, and the lessee granted under-leases containing no such stipulation, and upon a sale by the assignee of the original lessee, the conditions of sale stated the covenant in the original lease, and that such covenant would be inserted in the under-leases to be granted to the purchasers, but no mention was made whether the covenant was inserted in the under-leases already granted, the purchaser was allowed to recover his deposit from the auctioneer (x). Lord Tenterden observed, that he was of opinion that it is the duty of every person truly and honestly to represent that which he is to sell. A careful man and a lawyer looking at these conditions of sale might ask what were the terms of the leases which had been granted: The purchaser is informed by the statement in the conditions, that the original lessee is restrained from carrying on these obnoxious trades, and that in the leases to be granted to him a similar covenant is to be entered into. None but a very careful person would suppose that it could be doubtful whether the persons to whom under-leases had already been granted were bound in the same manner. He was, therefore, clearly of opinion that the plaintiff could not be bound to take the title.

34. In stating an estate to be of any given "clear" yearly rent, the parties should attend to the meaning of the word "clear," in an agreement between buyer and seller; which is clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, church-rates, &c., which are natural charges on the tenant (y).

36. As we have already seen, the statement that the property is in lease binds the purchaser to the covenants in the lease (z); but unusual ones should of course be stated.

(t) *Granger v. Worms*, 4 Camp. Ca. 39; see *Flight v. Booth*, 1 Bing. N. C. 83; see 1 Bing. N. C. 379; and see 370.
Tomkins v. White, 3 Smith, 435.

(u) *Flower v. Hartopp*, 6 Beav. 476.

(x) *Waring v. Hoggart*, 1 Ry. & Mood.

(y) *Earl of Tyrconnel v. Duke of Ancaster*, Amb. 237; 2 Ves. 500.

(z) *Supra*, p. 8. See *Paterson v. Long*, 6 Beav. 590.

37. Where the agreement was to sell the lease of a *public house*, described as held at a certain net annual rent under *common and usual covenants*, it was held that the contract was binding upon the purchaser, although the lease contained a covenant to pay the land-tax, sewers rate, and all other taxes, and a proviso for re-entry if any business but that of a victualler should be carried on in the house (a).

*38. And in *Barraud v. Archer* (b), where the particulars of sale described the estate, which was in the Isle of Ely, as consisting of fen land, and as being let to a tenant at the yearly rent of 165*l.*, and stated that the lessor allowed the eau-brink tax and land-tax: it appeared that the estate was also subject to other taxes for embanking and draining, under a local public Act of Parliament, and as they were not mentioned in the particulars, the purchaser claimed a compensation for them. On the part of the seller, it was insisted that there was no misrepresentation, and that the particular expressly mentioned that the estate was fen land, and enumerated all the taxes which the landlord allotted to the tenant, and that it was not usual to state the taxes which the tenant paid. The Vice-Chancellor held that the purchaser was not entitled to a compensation (c).

But if there be a misrepresentation, of course the purchaser would be entitled to compensation.

39. Where the particulars did not state that the annuity offered for sale, which was payable out of the tolls of Waterloo-bridge, was, as in fact it was, redeemable, and the bridge act had no such provision, the purchaser was held entitled to recover his deposit, for sellers should be strictly bound to disclose the real nature of the subject of the contract (d).

40. So where leasehold houses were sold by auction and described as a well secured rental for about fifteen years, with reversionary interest, and no notice was taken of an Act of Parliament which gave power to a company to purchase the property, the purchaser was held not to be bound by the sale, for he never intended to contract, and did not contract to purchase the mere right to compensation (e).

41. We have hitherto considered cases of alleged misdescrip-

(a) *Bennett v. Wornack*, 7 Barn. & Sim. 436, cited; *Pope v. Garland*, 4 Cress. 627; 1 Man. & Ry. 644. You. & Coll. 394.

(b) 2 Sim. 433; 2 Russ. & Myl. 751. (d) *Coverley v. Burrell*, *post*, c. 7.

(c) See *Lord Townsend v. Granger*, 2 (e) *Ballard v. Way*, 1 Mees. & Wels. 520.

tion, where the question simply was whether the property was properly described. But it is common for sellers to guard against misdescriptions and errors by an express condition that they shall not annul the sale, but that a compensation shall be given for the difference in value. Such a condition however does not extend to fraudulent errors.

42. This was decided by Lord Ellenborough in a case where the estate was stated in the particulars to be *about one mile* from Horsham. It turned out that the estate was between three and four miles from that place. Upon an action brought by the purchaser *for recovery of the deposit, it was insisted that the effect of the misdescription was saved by the condition, which provided that no error or misstatement should vitiate the sale. But Lord Ellenborough said, that in cases of this sort he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This he conceived was meant to guard against unintentional errors, not to compel the purchaser to complete the contract if he had been designedly misled. He therefore left it to the jury whether this was merely an erroneous statement, or the misdescription was wilfully introduced, to make the land appear more valuable from being in the neighborhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent (*f*).

43. And of course in equity, if the error be not a fair subject for compensation, a specific performance will be refused, although the misdescription arose simply from negligence(1); for equity will enforce a sale with a compensation for a slight unintentional misdescription, although there is no such condition (2), and will not assist the seller, where there is such a condition, if the misdescription is an important one. In *Stewart v. Allerton* (*g*), where a lease at rack-rent was described as one at a ground-rent, Lord Eldon treated

(*f*) *Duke of Norfolk v. Worthy*, 1 *Stewart v. Alliston*, 1 Mer. 26; *Trower v. Camp*, Ca. 337; see *Fenton v. Brown*, *v. Newcome*, 3 Mer. 704.
11 Ves. jun. 144; 1 Ves. & Bea. 377; (*g*) 1 Mer. 26.

(1) See *McFerran v. Taylor*, 3 Cranch, 270; *Bowles v. Round*, 5 Vesey jr. (Sumner's ed.) 508 and note.

(2) *King v. Bardeau*, 6 John. Ch. 38.

the case just as if there had been no such condition. The subject of the contract, he observed, did not answer the vendor's description of it, and that in a point so material as to exclude the doctrine of compensation, which ought never to be applied to a case like the present. He refused an injunction; and added, that even if a court of law should judge otherwise as to the representation, he should have great difficulty in decreeing a specific preformance, where the description was, at the best, of so ambiguous a nature, that it could not with certainty be known what it was that the purchaser imagined himself to be contracting for.

44. So in the case of *Powell v. Double* (*h*), a house was described in the particulars of sale as a brick-built dwelling-house. It turned out that the house was built partly of brick and partly of timber, and that some parts of the exterior were composed of only *lath and plaster, and that there was no party-wall to the house. Shortly after the sale the ancient chimneys fell inwards through the house, but it was not proved to what this was attributable. There was the usual condition, that misdescriptions should be the subject of allowance. The case was heard upon bill and answer, and the bill was dismissed with costs; as the Vice-Chancellor was of opinion that such a description means that the house was brick built in the ordinary sense, and that it was not a subject for compensation.

45. And even at law, if the description be of property not wholly belonging to the seller, and the part not belonging to him is an essential part, the case will not fall within the condition, although there be no fraud, but mere error; neither can a purchaser be compelled to take another property, with a compensation, in lieu of that by error described in the particulars (1).

46. Thus in a case at *nisi prius* (*i*), where the particulars stated one of the houses to be No. 4 instead of No. 2, although the names of the occupiers were correctly stated, and the houses Nos. 2 and 4 were of the same description, but the latter was in rather better repair than the former, the purchaser brought an action for his deposit, insisting upon his right to rescind the contract, notwithstanding the condition under consideration. Best, C. J., agreed with the rule as laid down by Lord Ellen-

(*h*) MS. V. C. 15 June 1832.

(*i*) *Leach v. Mullett*, 3 Car. & Pay. 115.

(1) See *Graham v. Hendren*, 5 Munf. 185; *Reed v. Hornback*, 4 J. J. Marsh, 377.

borough, and said that if it was a mere error, or misstatement from error, it was cured by the conditions. If it was pure mistake, not prejudicing the party, it would be cured by the conditions; but he thought that auctioneers ought to be narrowly watched, lest, under the idea of mistake, they covered material matters; but if the description was of *any other property* than that intended to be sold, though it was made by error, the conditions did not cure it. If the purchaser had intended to buy the house sold, notwithstanding the misdescription, he should have thought that the jury would be justified in finding a verdict for the defendant, for he should not suffer the purchaser to take advantage of a mistake by which he was not prejudiced.

47. In a case (*k*) in which a sale by auction was made under a power in an annuity deed, and the estate was described as a substantial brick building and two plots of ground, the whole estimated to let at 35*l.* per annum, and the conditions stated that one of the plots could not be properly identified by the seller, but the purchaser was to accept by the description only contained in the *conveyance of it, and there was the common condition as to errors, — the plot not identified could not be found, and the property was not what is called a substantial brick building, and would not fetch the rent stated, — the purchaser was allowed to recover his deposit. The Chief Justice was of opinion, that if any substantial part of the property had no existence or could not be found, the purchaser might rescind the contract *in toto*, even if the seller was not guilty of any fraudulent misrepresentation in that respect (1): deficiency in value might be fit matter for compensation, but not the total absence of one of the things sold. With reference to the general description, was that, the learned judge asked the jury, a *bona fide* description or not? If they thought it an exaggerated description, quite beyond the truth, and that the seller was not acting *bona fide* when he gave it, that circumstance alone would entitle the purchaser to rescind the contract, notwithstanding the language of the condition as to errors.

(*k*) *Robinson v. Musgrove*, 2 Mood. & Rob. 92.

(1) A vendor is bound to know, that he actually has what he proposes to sell. And even though the subject matter of the contract be liable to a contingency, which may destroy it immediately, if the contingency has in fact happened, the contract will be void: as, if a life estate in land is sold, and at the time of the sale the estate is terminated by the death of the person, in whom the right vested, a court of equity will rescind the purchase. *Allen v. Hammond*, 11 Peters, 70. If a horse is sold, which both seller and purchaser believed to be alive, the purchaser would not be compelled to pay the consideration, if in fact, at the time of the sale, the horse is dead. *Allen v. Hammond*, 11 Peters, 63.

48. In another recent case (*l*), where, upon a sale by auction, the above-mentioned condition was inserted in the conditions of sale, it appeared that the house was leasehold, but that a small yard mentioned in the particulars was not included in the lease, but was held from year to year at a separate rent; and, although it did not appear that the sellers, who had recently acquired the premises, were aware of the fact; yet, as the yard was proved to be an essential part of the premises, and was held only from year to year, instead of for the term in the house as stated in the particulars, and at a separate rent, the Court held clearly that the defect was not matter of compensation.

49. And where the misdescription, although an unintentional one, is such as would induce a person to bid who really wanted the subject as described, and not the subject as it exists, or perhaps in other words, where there is a substantial misdescription, it will not fall within the condition.

50. Thus in a late case (*m*), where the premises were described in the printed particulars of sale, on the back of which the purchaser had signed the memorandum of the contract, as calculated for an extensive business in carpets, haberdashery, drapery, paper, floor-cloth, upholstery, grocery, tea-trade, or coach-building. The premises were situated in the Piazza, Covent-Garden. The particulars also stated, "that no offensive trade is to be carried on: they cannot be let to a coffee-house keeper, or working hatter." There was the usual condition as to mistakes, &c. not vitiating the *contract. The lease was produced at the sale, and the proviso for re-entry partially read: which circumstance was used only to negative any wilful concealment or misrepresentation by the seller of the terms of the lease. The proviso for re-entry extended, amongst other things, to the premises being used for various specified trades, or as a shop or place for the sale of any provisions whatever. It was held that the purchaser might rescind the contract. The Court treated the case as standing clear from any fraud, and took the description to have originated either from ignorance, inadvertence, or accident. The question therefore simply was, whether the misdescription fell within the condition. It was extremely difficult, the Chief Justice observed, to lay down from the decided cases any certain definite rule which should determine what mis-

(*l*) *Dobell v. Hutchinson*, 3 Adol. & (*m*) *Flight v. Booth*, 1 Bing. N. S. Ell. 355; and see *Mills v. Oddy*, 2 370. Crompt. & Mees. 103.

statement or misdescription in the particulars should justify a rescinding of the contract, and what should be the ground of compensation only. All the cases concur in this, that where the misstatement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to misstatements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no misstatements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Duke of Norfolk v. Worthy*, *Wright v. Wilson*; whilst other cases lay down the rule, that a misdescription in a material point, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all; in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts, the purchaser may be considered as not having purchased that which was really the subject of the sale, as in *Jones v. Edney*, where the misdescription was held to be fatal (I). It appeared to the Court that a lease which was described as containing a restriction against offensive trades, and a lease containing restrictions not only against offensive trades, but also against some trades that are inoffensive, were not one and the same thing, but a different subject matter of contract: and that where a man purchases by the former description, it may very well be supposed that he would not have become the *purchaser, whether he bought for the purpose of carrying on trade upon the premises himself or for money investment, if he had known the lease had contained the larger and more extensive restrictions, and the purchaser was held not to be bound by the sale, but entitled to recover his deposit.

51. And in the case of *Dykes v. Blake* (n) already referred to where a right of way over the lot sold was not described so as to bind the purchaser, there was the usual condition as to misdescriptions, &c. The lot was described as "a first-rate building plot of ground," and as having an extended frontage; and it was

(n) *Supra*, p. 26; 4 Bing. N. C. 476.

(I) The Chief Justice referred to *Jones v. Edney*, and *Waring v. Hoggart*, as authorities that misdescription by negligence only would vitiate the sale; but in neither of these cases does there appear to have been the above condition.

held that this was not a subject of compensation within the condition. The Court observed that the purchaser might safely conclude, as the seller intended him to conclude, that he might purchase the whole lot for the purposes of building. But the direction of the way claimed would render the close altogether useless for the very purpose for which it was known to be purchased.

52. And although there be this condition providing a compensation, yet the sale will be void if from the nature of the case no estimate can be made of the diminution in value. Thus where a reversion was sold after the death of a person aged 66, in case he should not have children, and it turned out that he was only 64, Lord Tenterden held that the sale was void. He said that in the case of a reversion simply expectant on the death of an individual, if a mistake be made in his age, a compensation may be made under the condition, for the difference of value may be computed; but where there is an additional contingency, such as that of the birth of future children, in this case the difference of age alters the likelihood of the contingency, and in such a case therefore no estimate can possibly be made of the difference in value between the thing described and the thing sold, and the contract itself must be vacated (*o*).

53. And in *Flight v. Booth* (*p*), where the covenants restricting the trades were not truly stated, the Chief Justice asked how the condition could govern such a misstatement as that, what action at law could be framed upon it? It would at least, he added, involve the purchaser in great difficulty.

54. And the case of *Stewart v. Allerton*, before quoted, may perhaps also be referred to this head, for Lord Eldon thought the difference between an estate let upon a ground rent and one let at rack rent was not a subject for compensation (*q*).

*55. So far the points appear to be settled, but as the reader will have observed, a difference of opinion seems to have prevailed upon this *general* point, viz., whether a misdescription in an important respect is fatal where it is occasioned by carelessness or error, and not by fraud. In addition to the opinions expressed in the cases already quoted there are other authorities on this head.

56. Thus in *Wright v. Wilson* (*r*), where the action was brought to recover the deposit on account of a misdescription, and there

(*o*) *Sherwood v. Robins*, 1 Mood. & Malk. 194; 3 Carr. & Pay. 339.

(*p*) 1 Bing. N. C. 378, 379.

(*q*) *Supra*, p. 30; 1 Mer. 26.

(*r*) 1 Mood. & Rob. 207.

was the usual clause as to misdescriptions, it appeared that the particulars of sale referred to a map as containing the description of the estate, and in that map a turnpike road was set out immediately adjoining the premises; whereas it turned out that there was no turnpike road within a quarter of a mile, and that what on the face of the map appeared as a turnpike road was, in fact, a mere footpath.

There was no evidence on either side to show how the misdescription had originated, although it was said to have arisen from the miscopying of a map (s). Mr. Justice Park, after referring to the case of the *Duke of Norfolk v. Worthy*, said that he should direct the jury that if the misdescription was a wilful and designed one, and had been inserted by any one employed to make the plan or connected with the sale, that would be a fraud adopted by the vendors, and consequently would annul the bargain altogether, although the vendors themselves might not have been aware of the misdescription. But if the jury thought that the misdescription had originated in error, then *however gross the negligence of the vendors might be*, he was of opinion that they were bound to find their verdict for the vendors. Supposing even that the mistake were so important as the purchaser's counsel offered to prove it to be, still the purchaser must abide the event of having bought an estate without looking at it, and subject to the condition in question. He was further of opinion, that the onus of proving the fraud lay on the purchaser, the presumption of law being against fraud.

57. Again (t), where a house was sold by auction as held by a low ground rent, viz., at a ground rent of 15*l.* per annum, and in truth the house and three others were comprised in an original lease at 35*l.* a year, and there was the usual clause as to errors of description, the Learned Judge at *nisi prius* put the question as being whether this was a wilful misdescription by the sellers or by some of their agents, or a mistake. He should say that it was a wilful misdescription, and that there was no doubt about it. The *purchaser had a right to avoid the sale unless the jury should think the misdescription arose from mistake. This was a misdescription which would materially enhance the value.

58. We cannot fail to perceive that the strong leaning of the Courts is properly against the seller where the misdescription is an important one, and not fairly a subject for compensation. The

(s) See 6 Carr. & Pay. 734.

(t) *Mills v. Oddy*, 6 Carr. & Pay. 728.

opinion expressed in *Wright v. Wilson*, that if there be error only, the purchaser will be bound, however gross the negligence of the seller may have been, has not been followed, nor can the onus of proving the fraud altogether be thrown upon the purchaser where there is a gross misdescription. For gross negligence may well be held tantamount to fraud, where a seller issues an actual description of his property, and limits his responsibility by such a condition, and a jury would be warranted in coming to the conclusion that there was fraud, from the facts, viz. the means of knowledge, the duty imposed upon the seller to use due diligence, the description varying in important matters from the actual state of the property, and the tendency of the misdescription to mislead a purchaser whom it may be said compensation would not compensate. It is not like a case where the seller should say, 'I do not choose to inquire; I have described the property as I believe it to be, and if any one buy, he must take it whether it answer the description or not, only with a compensation.' But in these cases the purchaser has a right to presume that the seller is acting *bona fide*, and has used due diligence. The condition, as the Court observed in *Flight v. Booth*, will comprehend a case where there is half an acre more or less than is described, or cases which resolve themselves into simple cases of that nature (*u*). This is no doubt clearer, where the condition provides for a compensation to be paid to either the purchaser or the seller, as the case may be, than where it applies only to a compensation to the purchaser; for the former condition, which is the usual one, forbids the construction that the seller is, by gross negligence, to misdescribe the property and then to claim an additional price for some advantage which he has omitted to mention; and the like construction must prevail, whether the compensation be payable to the purchaser or to the seller (1).

59. Where the timber and other trees are to be taken by the purchaser at a valuation, it should be stated accurately for what trees he is to pay.

60. In case where there were several lots, it was stated after two of them, that the timber on them was to be paid for. The particulars *were silent as to the timber on the other lots, which was of considerably greater value; but there was a general condition that all the timber and timber-like trees, down to 1s. per stick inclusive,

(*u*) 1 Bing. N. C. 378. See *Cattell v.* s. 1; *White v. Cuddon*, 8 Cla. & Fin. Corral, 3 You. & Coll. 413, *post*, ch. 8, 766.

(1) See upon this subject the cases cited ante 4, in note.

should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it: and the Master of the Rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that he refused to compel him to perform the contract according to the seller's construction (x).

61. But although it should be merely stipulated that the purchaser shall pay for *timber*, yet he must pay for trees not strictly timber, if considered so, according to the custom of the country (y); and in one case, where by the condition it was expressed that all timber and timber-like trees should be taken at a valuation, the purchaser was held liable to pay for certain pollards (z).

62. It is proper, also, to make some provision as to articles not properly fixtures. Lord Hardwicke, said, that if a man sells a house where there is a copper, or a brewhouse where there are utensils, unless there was some consideration given for them, and a valuation set upon them, they would not pass (a). But in the absence of any stipulation, common fixtures would pass to the purchaser under the common conveyance (b) (1): unless it could be collected from

(x) *Higginson v. Clowes*, 15 Ves. jun. 516.

(y) *Duke of Chandos v. Talbot*, 2 P. Wms. 601; *Anon.* Ch. 25 July 1808.

(z) *Rabbett v. Raikes*, Woodfall L. & T. 224, 6th ed.; and see *Aubrey v. Fisher*, 10 East, 446.

(a) *Ex parte Quincey*, 1 Atk. 478.

(b) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76; 3 Dowl. & R. 255; *Ex parte Lloyd*, 1 Mont. & Ayr. 494; *Longstaff v. Meagoe*, 2 Adol. & Ell. 167; *Hitchman v. Walton*, 4 Mees. & Wels. 409.

(1) As between vendor and vendee of land, all fixtures pass to the latter, though they were created for the purposes of trade or manufactures. *Miller v. Plumb*, 6 Cowen, 665. The rule is the same as between heir and executor, ib; *Spencer Ch. J.* in *Holmes v. Tremper*, 20 John. 29. But it is otherwise, as between tenant and landlord or reversioner, and as between tenant for life and remainder-man. *Miller v. Plumb*, 6 Cowen, 665. A cotton gin attached to the gears in the gin-house upon a cotton plantation, passes with the land. *Farris v. Walker*, 1 Bailey, 510. So of a packing screw. *McDaniel v. Moody*, 3 Stewart, 314. So a steam engine with its fixtures, used to drive a bark-mill and pounders, to break hides in a tannery, erected by the owner, passes by the sale of the freehold. *Ives v. Ogelsby*, 7 Watts, 106. See *Voorhies v. Freeman*, 2 Watts & Serg. 116; *Pyle v. Pennock*, 2 Watts & Serg. 390; *Sparks v. State Bank*, 7 Black. 469. So a steam-engine, boilers, &c. and machinery adapted to be moved by such engine, by means of connecting bands, and other gearing, which are placed in a building, designed for the manufacture of steam-engines and other heavy iron work, are fixtures or in the nature of fixtures; *Winslow v. Merchants' Ins. Co.* 4 Metcalf, 306; and as between the mortgagor and mortgagee, cannot be removed by the mortgagor, or otherwise disposed of by him, while the mortgage is in force, though placed in the building by the mortgagor after the mortgage, ib.; *Voorhies v. Freeman*, 2 Watts & Serg. 116; *Pyle v. Pennock*, 2 Watts & Serg. 390; *Day v. Perkins*, 2 Sandford Ch. 359. In *Despatch Line of Packets v. Bellamy Manf. Co.* 12 N. Hamp. 205, it was held that an engine used in a building, and which could not be removed without taking down a part of the building, will pass by a conveyance of the land; and machines and other articles essential to the occupation of a building, or to the business carried on in it, and

the context that they were not intended to pass ; as if a conveyance be made of an iron-foundry and a dwelling-house, together with all grates, boilers, bells, and other fixtures in and about the dwelling-

which are affixed or fastened to the freehold, and used with it, partake of the character of real estate, become part of it, and pass by conveyance of the land. But where the owner of a wool-carding factory had mortgaged it and the appurtenances for carrying on the same, but still remained in possession, the machinery, attached to the building by a leather band, which might easily be slipped off, but on account of its size and weight being required to be taken in pieces in order to remove it, was held liable to be taken by the creditors of the mortgagor. *Gale v. Ward*, 14 Mass. 352. See *Walker v. Sherman*, 20 Wendell, 636. The above case of *Gale v. Ward* is said not to be opposed to the decision in *Winslow v. Merchants' Ins. Co. ubi supra*, 4 Metcalf, 313, 314. A mortgagor has no right to remove a grist-mill or the appurtenances erected by him on the mortgaged land. *Petengill v. Evans*, 5 N. Hamp. 54. By the conveyance of a saw-mill with the appurtenances, the mill-chain dogs and bars, being in their appropriate places at the time of the conveyance, were held to have passed. *Farrar v. Stackpole*, 6 Greenl. 154. A kettle in a fulling-mill set in brick work, passes to the mortgagee of the mill. *Union Bank v. Emerson*, 15 Mass. 139 ; *Despatch Line of Packets v. Bellamy Manf. Co.* 12 N. Hamp. 233. Where the owner of land erects upon it a dye-house, and sets up dye-kettles therein firmly secured in brick work, they become part of the realty and pass by a deed of the land, without express words. *Noble v. Bosworth*, 19 Pick. 314.

Iron stoves fixed to the brick work of the chimnies of an house are a part of the house, and pass with it on an extent of an execution upon it. *Goddard v. Chase*, 7 Mass. 432.

Windows in a dwelling-house are fixtures, and pass by the conveyance of the estate. *State v. Elliot*, 11 N. Hamp. 540.

Fencing materials on a farm, which have been used as a part of the fences, but are temporarily detached, without any intent of diverting them from their use as such, are a part of the freehold, and pass by a conveyance of the farm to a purchaser. *Goodrich v. Jones*, 2 Hill, 142. See *Despatch Line of Packets v. Bellamy Manf. Co.* 12 N. Hamp. 232 ; *Gibson v. Vaughn*, 2 Bailey, 389. A conveyance of land conveys the grain growing on it to the purchaser. *Wilkins v. Vashbinder*, 7 Watts, 264 ; *Burnside v. Wightman*, 9 Watts, 46 ; *S. C.* 2 Watts & Serg. 268. But see *Austin v. Sawyer*, 9 Cowen, 39. Grave stones, when erected, are fixtures. *Sabin v. Harkness*, 4 N. Hamp. 415.

Other articles, though in some measure attached to the freehold, have been held not to pass by a conveyance of it. Such as a stove, with a funnel running into the chimney. *Williams v. Bailey*, 3 Dana, 152 ; *Freeland v. Southworth*, 24 Wendell, 191 ; *Green v. First Parish in Malden*, 10 Pick. 504 ; *Goddard v. Chase*, 7 Mass. 432 ; *Gaffield v. Hapgood*, 17 Pick. 192 ; *Gray v. Holdship*, 17 Serg. & R. 415. So a still fixed in a rock furnace, which furnace was built inside and against the wall of a house erected for the purpose, was held not to pass by the extent of an execution on the land, in *McClintock v. Graham*, 3 McCord, 553.

Where the land conveyed is *public property*, the grant will not pass wood, which has been previously cut and corded by a person without title. *Jones v. Snelson*, 3 Missouri, 393.

Machinery in a woolen factory, not appearing to be affixed or fastened to the buildings or land, does not pass with the freehold on a division of real estate. *Walker v. Sherman*, 20 Wendell, 636 ; *Despatch Line of Packets v. Bellamy Manf. Co.* 12 N. Hamp. 234. See *Gale v. Ward*, 14 Mass. 352 ; *Farrar v. Stackpole*, 6 Greenl. 154 ; *Voorhies v. Freeman*, 2 Watts & Serg. 116 ; *Cresson v. Stout*, 17 John. 116, 121 ; *Swift v. Thompson*, 9 Conn. 63.

A mortgagee after a recovery on a bill in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away a barn, and a shed used as a blacksmith's shop, erected by him on the land mortgaged, the materials of which were his own, there being no cellar under either of the buildings, and no injury done to the soil by the removal, other than what may have arisen from taking up a few posts on which the end of the barn rested. *Taylor v. Townsend*, 8 Mass. 411.

house ; the enumeration of the fixtures in the house will prevent the fixtures in the foundry from passing (c).

63. If a seller wish to protect himself against the production of deeds not in his possession, he must state distinctly his intention, for a condition that the seller should deliver an abstract and deduce a good title was held to authorise the purchaser to require the deeds to be produced to verify the abstract, although they were not all in the seller's possession ; and in the condition to deliver up to the purchaser all the title-deeds and copies of deeds or other documents in the seller's custody, it was expressed, " but that he should not be bound to produce any original deed or other *documents than those in his possession and set forth in the abstract." It was observed, that it by no means follows that the vendor cannot prove his title because he has not in his possession all the deeds necessary for that purpose. It could not therefore have been inferred by the purchaser that the restriction as to the liability to deliver up certain deeds was to apply to the liability to produce them for the purpose of proving the title, and if that inference was not obviously to be drawn from the conditions, a court of equity ought not to compel a purchaser to take the estate without a title. There was nothing in the conditions of sale sufficient to lead the purchaser to understand that he would have no right to have any evidence of any title to the land sold, unless the vendor should happen to be in possession of deeds sufficient for that purpose, a circumstance of which the purchaser could know nothing. Whether that was the intention of the vendor or not was immaterial, if he did not take proper means to explain such intention to the purchaser (d).

(c) *Hare v. Horton*, 5 Barn. & Adol. 207. (d) *Southby v. Hutt*, 2 Myl. & Cra. 715 ; see *Birch v. Dawson*, 2 Adol. & Ell. 37 ; a case upon a will.

The movable scenery in a theatre, and the flying stages, do not pass with the building ; but the permanent stage does. *Olympic Theatre*, 2 Browne, 279, 285.

A house built for a distillery was sold, and it was held that the joists, rats, buckets, pickets, and faucets, did not pass by the deed ; but the pumps, cisterns, iron-gratings, door, distillery, and horse-mills, passed by the deed. *Kirwan v. Latour*, 1 Harr. & John. 284. See *Hovey v. Smith*, 1 Barbour, 372.

The rule that objects must be actually and firmly affixed to the freehold, to be considered realty, or otherwise to be considered personalty, is far from furnishing a criterion of what shall be deemed fixtures. Doors, window-blinds and shutters, capable of being removed without the slightest damage to a house, and even though, at the time of conveyance, attachment, or mortgage, actually detached, would be deemed a part of the house and pass with it. And so mirrors, ward-robres, and other heavy articles of furniture, though fastened to the wall by screws with considerable firmness, must doubtless be regarded as chattels. *Winslow v. Merchants Bank*, 4 Metcalf, 314.

See further on the subject of fixtures, *Chitty Cont.* (8th Am. ed.) 314 et seq. and notes.

64. And there must be express conditions where the seller intends to throw upon the purchaser the expense of searches, of making out the representation to attendant terms, or of the assignment of them, or the expense of travelling to a distant place to examine the abstract with the deeds or the like.

65. Where the title-deeds cannot be delivered up, some provision should be made as to the expense of the attested copies, and the covenants to produce them, which will otherwise fall upon the vendor (*e*); and where the estate is sold in many lots, and the title-deeds are numerous, nearly the whole purchase-money may, perhaps, be exhausted. In one case, the lots were more than 200, and the copies came to 2,000*l*.

66. If the estate is leasehold, and the vendor cannot procure an abstract of the lessor's title, this fact should be stated in the conditions (*f*).

67. A purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and covenants in the lease, although he is not expressly required to do so by the conditions of sale (*g*); and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee (*h*); but assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser *to enter into such a covenant for their indemnity or the indemnity of the bankrupt (*i*).

68. And although a purchaser is not required by the conditions of sale to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved (*k*).

69. Where a vendor is only an assignee of a leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate over (*l*), and consequently, in such case, there is not

(*e*) *Dare v. Tucker*, 6 Ves. jun. 460; and *Berry v. Young*, 2 Esp. Ca. 640, n. See *post*, c. 9.

(*f*) See *post*, ch. 10; and see *Denew v. Deverell*, 3 Camp. 451.

(*g*) See *Pember v. Mathers*, 1 Bro. C. C. 52; *Ex parte Little*, 3 Molloy, 67; and see *post*, ch. 4, as to the obligation of a purchaser of an equity of redemption to indemnify the vendor against the mortgage-money.

(*h*) *Staines v. Morris*, 1 Ves. & Beam. 8.

(*i*) *Wilkins v. Fry*, 1 Mer. 244. See 6 Geo. 4, c. 16, s. 75, *post*; *Slack v. Sharpe*, 8 Adol. & Ell. 366.

(*k*) *Pember v. Mathers*, 1 Bro. C. C. 52; and see *post*, ch. 3; ch. 4, s. 2, pl. 12, &c. &c.

(*l*) See 1 Treat. Eq. 2d ed. p. 350, and Fonbl. n. (*y*) *ibid.*; and see *Taylor v. Shum*, 1 Bos. & Pull. 21; *Fagg v. Dobie*, 3 You. & Col. 96.

anything for a purchaser to indemnify against. It has lately been decided that the assignee is liable to indemnify the lessee who assigned to him against breaches *during the time he (the assignee) is in possession*, although he has not covenanted to indemnify the lessee (*m*), but not further (*n*). And where a purchaser from an assignee of a lease agreed to take the estate without an assignment, and held it to the end of the term, he was held liable to the lessee in equity for breaches of covenant during his possession, although the lessee was not a party to the contract for sale (*o*).

70. An assignment to hold subject to the payment of the rent and to the performance of the covenants in the lease, will not operate as a covenant so as to bind the assignee after he has assigned over (*p*).

71. It should always be stated in the conditions, that the conveyance shall be prepared *by* and at the expense of the purchaser (*q*).

72. The usual condition, "that if the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any, by such sale, together with all charges attending the same, shall be made good by the defaulter," should never be omitted. It forms a lien on the estate for the purchase-money, &c., and if the purchaser do not comply with the conditions, the vendor may, *by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser (*r*) (1). And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself will be entitled to retain it.

73. It is now usual to stipulate, that in case of default by the purchaser he shall forfeit the deposit, and that the amount of the expenses of a re-sale, &c., shall be recoverable *as stipulated damages*. Upon such a stipulation Lord Tenterden held at *nisi prius*, that whether the term used was penalty or liquidated da-

(*m*) *Burnett v. Lynch*, 5 Barn. & Cress. 561.
589; 8 Dowl. & R. 368.

(*n*) *Mills v. Harris*, 1 Nev. & Per. 569,
cited; see *Beale v. Sanders*, 3 Bing. N. C. 850.

(*o*) *Close v. Wilberforce*, 1 Beav. 112.

(*p*) *Wolveridge v. Steward*, 3 Nev. &

(*q*) See *post*, ch. 4, sec. 4 §§ 58 et seq.

(*r*) *Ex parte Hunter*, 6 Ves. jun. 94;
and see *Moss v. Matthews*, 3 Ves. jun. 279; *Mertens v. Adcock*, 4 Esp. Cas. 251; *sed vide* 7 Ves. jun. 275. See *Greaves v. Ashlin*, 3 Camp. Ca. 466.

(1) And the vendor cannot maintain an action against the vendee, for a breach of the contract of sale, until, on a re-sale, the deficit shall have been ascertained. *Webster v. Hoban*, 7 Cranch, 399.

mages, a party who claims compensation for default should only be allowed to recover what damage he had really sustained. He confined his opinion to contracts not under seal; instruments in that form might, perhaps, receive a different construction (*s*). But in a later case before Best, C. J., he expressed a different opinion, — that whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be the stipulated sum (*t*). But whichever be the correct opinion, a jury may, without proof of damage, give the whole sum named. This observation applies to a stipulation that the deposit shall be forfeited and belong to the seller as stipulated damages. Where the expenses of the re-sale, &c., are stipulated for, the measure of damages would be those expenses, &c.

74. But a condition, that if the purchaser shall neglect or fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, to be retained by the seller, with power to him to rescind the contract and re-sell, and the deficiency to be made good by the purchaser, does not preclude the seller from maintaining an action for general damages, where the purchaser breaks off from the contract altogether. It applies in case of a breach of any of the particular conditions (*u*).

75. Where there is no specific provision, the question whether the deposit is forfeited depends on the intent of the parties, to be collected from the whole instrument. Therefore, where 300*l.* was paid by way of deposit, and in part of the purchase-money, and the agreement stipulated that if either party should refuse to perform the agreement he should pay to the other 1,000*l.* as liquidated damages, it was held to be clear that there should be no other *remedy; consequently, although the purchaser had made default, and the vendor might have sued for the penalty, and recovered damages, yet, as he had sold the estate to another, the purchaser was allowed to recover the deposit (*x*).

76. The general question, whether one contracting for the purchase of landed property, who refuses to complete his contract, may recover the deposit from the vendor on his afterwards selling the property to another, was not decided in the above case; but the impression of the Court seems to have been, that the deposit

(*s*) *Rundal v. Everest*, 1 Mood. & Malk. 240.

41; see *Boys v. Ansell*, 5 Bing. N. C. 390.

(*u*) *Icely v. Grew*, 6 Nev. & Man. 467.

(*x*) *Palmer v. Temple*, 1 Per. & Dav.

(*t*) *Crisdee v. Bolton*, 3 Carr. & Payn. 379; 9 Adol. & Ell. 508.

would not be forfeited by a breach of the contract on the part of the purchaser, unless there is a clause to that effect in the contract. It was asked by one of the learned judges, whether, supposing the contract contained no stipulation for a forfeiture of the deposit, the vendor could retain the deposit and sue for damages too (*y*)? But where a purchaser is in default, and the seller has not parted with the subject of the contract, it is clear that the purchaser could not recover the deposit; for he cannot, by his own default, acquire a right to rescind the contract. The question will then remain, whether the seller's resale of the estate will give the purchaser a right to rescind. It would seem not, if the sale was after the purchaser's default; for as the purchaser by his act has lost the right to enforce the contract, the disposal of the estate by the seller prejudiced no right of the purchaser, and could impart to him no right to *rescind* a contract which he had already *broken*. The sale does not purge the previous default of the purchaser. To him it matters not whether the seller receives the profits himself, or lets or sells the *estate*, for in either case he cannot *enforce* the contract. The sale, it is argued, prevents the seller from performing the first contract. But the answer to this is, that he cannot be compelled to perform it. How, therefore, does it differ the case that he has sold what he might, in spite of the purchaser's claim, retain in his own hands for his own use. He has sold what the purchaser has lost his right to demand. The second sale does not give to the purchaser a right of action for damages, although the subject of the first contract is disposed of. If, therefore, in consequence of the purchaser's default the seller is at liberty to resell for his own profit, he does a lawful act from which no damage results to the first purchaser, and which, it should seem, cannot revive in the latter a right to recover the deposit which did not exist before the second sale.

77. If the purchaser, after breaking the condition, become bankrupt, *and the estate is re-sold at a loss, the expenses of the sale, &c., being in the nature of unliquidated damages, cannot be proved under the commission; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate, first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards

(*y*) See 1 Per. & Dav. 382.

payment of the original purchase-money ; and the balance may be proved under the commission (z).

78. In a recent case (a), a leasehold house and furniture had been sold for 4,370*l.*, and the assignment was executed, but neither it nor the lease, nor possession, had been delivered ; and the purchaser declining to complete the contract, the sellers brought an action and recovered the whole amount of the purchase-money and costs. The purchaser became a bankrupt, and the assignees took possession of the house. The seller then sold the house and furniture at a considerable loss ; and Lord Eldon considered that they were entitled to a lien for the amount of the sale and costs, and to a proof for the difference, although it was insisted that they were concluded by their action.

79. Where a time is allowed by the conditions obviously for the purchaser's convenience, although not so expressed, it will be held to be confined to him. This was decided upon the sale of goods—hemp—by auction, where the condition was, that the goods were to be cleared in fourteen days at the purchaser's expense ; and it was held that this was an allowance to the purchaser, and that the seller was bound to deliver the hemp immediately on demand (b).

80. The other provisions, which ought to be inserted in conditions of sale, are so well known as not to require notice.

81. Although a vendor ought, by proper conditions, to be relieved from obvious difficulties and from expenses which may be unfairly pressed as against him, but which a purchaser, if left to bear them, would take care should fall lightly upon himself, yet the general practice between vendor and purchaser should be adhered to as near as may be. In some instances, for example, the sale for the first time of houses in a town which have long been the property of one family, purchasers may be found to purchase, subject to any conditions which the seller may think fit to impose ; yet, in the general run of sales, unusual conditions alarm or disgust parties or their solicitors, and they stay away from the sale, or, if *they purchase, they interpose every possible obstacle in the way of the title, as a set-off against the hard conditions to which they were compelled to subscribe. The common conditions of sale will

(z) *Ex parte Hunter*, 6 Ves. jun. 94 ;
Bowles v. Rogers, *ibid.* 95, n. ; 1 Cooke,
 123 ; see *Hope v. Booth*, 1 Barn. & Adol.
 507.

(a) *Ex parte Lord Seaforth*, 1 Rose,
 305 ; *ex parte Gyde*, 1 Glyn. & Jam. 323.
 (b) *Hagedorn v. Laing*, 6 Taunt. 514 ;
 1 Marsh. 162.

always be found to facilitate the completion of the purchase, where the seller has a good title.

82. Conditions of sale, giving a right of entry to take away produce, for example, may, as a license, bind a third party who has assented to them, although he is not a seller (*c*).

83. Immediately after sale of an estate by auction, an agreement (*d*) to complete the purchase should be signed by the parties or their agent, because sales by auction of estates are within the statute of frauds (*e*); and consequently, the contract could not be enforced against either of the parties who had not signed an agreement (*f*). Although a man purchase several lots, yet a distinct contract arises upon each lot, and consequently if no lot is of the value of 20*l.* no stamp is necessary, although altogether they are of more value (*g*) (1), but they may all be comprised in one agreement.

84. An auctioneer, however, as the agent of the purchaser, which for this purpose in law he is, may bind him to the bidding, by signing for him; if therefore he put down the purchaser's name as the buyer, and the amount of the bidding opposite to the lot in the particulars and conditions of sale, or make an entry in his books of all the requisite particulars, the purchaser will be bound (2). And on the other hand the auctioneer's receipt for the deposit may amount to an agreement, binding upon the seller, if it contain the names of the seller and purchaser, the description of the estate sold and the price, and refer to the conditions so as to enable the Court to read them. For in either case, the memorandum, entry, or receipt by the auctioneer, must in itself, or with the particulars or other paper which it embodies by a reference, contain all the particulars required to the validity of a written agreement. But this subject properly belongs to the third chapter, in which the statute of frauds is considered; to which, therefore, the reader is referred. I may here, however, observe, that an auctioneer signing an agreement as in his own name, may show that it was really on behalf of his principal (*h*).

(*c*) See *Wood v. Manley*, 11 Adol. & Ell. 34.

(*d*) See a form of an agreement, Appendix, No. 2.

(*e*) See *post*, ch. 3.

(*f*) See *post*, ch. 3. See a form of an agreement, Appendix, No. 3.

(*g*) *Emmerson v. Heelis*, 2 Taunt. 38.

(*h*) See 2 Nev. & Per. 519.

(1) And where land is sold at auction in separate lots, and several of the lots are purchased by one person, it is not an entire contract; and if the vendor cannot give a title as to all the lots, the vendee cannot rescind the agreement *in toto*, but must take the conveyance for such of the lots as the vendor is authorized to convey. *Van Eps v. Schenectady*, 12 John. 436.

(2) *Post*, p. 132, ch. 3. sec. 5, § 8.

*SECTION IV.

OF AUCTIONEERS AND AGENTS, AND OF THE DEPOSIT
AND PURCHASE-MONEY.

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| 1. Auctioneer liable if no authority. | 18. Interpleader by auctioneer in equity. |
| 3. If sale defeated by his negligence,
not entitled to commission. | 22. At law. |
| 4. Amount of commission on sale. | 24. Loss by insolvency of auctioneer falls
on seller. |
| 5. Amount for finding a purchaser. | 25. Auctioneer liable where principal not
disclosed. |
| 6. When it is payable. | 26. Not liable to interest. |
| 7. Agent bidding beyond his authority. | 27. May pay to insolvent principal. |
| 9. Agent to sell not entitled to receive
the money. | 28. Payment to agent payment to prin-
cipal. |
| 10. Auctioneer cannot give credit. | 29. Deposit invested by Court at risk of
seller. |
| 11. Set-off. | 30. Where loss by sale cannot be thrown
on purchaser. |
| 12. Remittance by seller's direction. | 31. Seller not bound by investment with-
out his assent. |
| 13. Purchaser may stop his check if con-
tract void. | 32. Waiver of payment of deposit. |
| 14. Must not pay agent before the fixed
time. | 33. No election to forfeit deposit. |
| 15. Seller's direction to pay third person
binding. | 34. Forfeiture of deposit relieved against. |
| 16. Deposit is part payment. | 35. Seller to repay deposit although his
bill dismissed. |
| 17. Auctioneer to retain it till contract
completed. | |
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1. It frequently happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction-room. Notice of an intended sale by auction is said to be a contract with all the world: and the parties to whom the notice is addressed ought not to be put to the expense and trouble of attending the auction unless the sale is to take place. It should be stated, therefore, in the advertisements, that the estate will be sold by auction at the place and time fixed upon, *unless previously sold by private contract; in which case notice of the sale shall be immediately given to the public: and notice should be given accordingly.*

2. If an auctioneer sell an estate without a sufficient authority,

so that the purchaser cannot obtain the benefit of his bargain, he (the auctioneer) will be compelled to pay all the costs which the *purchaser may have been put to, and the interest of the purchase-money, if it has been unproductive (*a*), for there being no principal who is responsible, the auctioneer is answerable as principal, otherwise the purchaser would have no remedy (*b*) (1).

3. And if an auctioneer do not insert usual clauses in the conditions of sale, whereby the sale of the estate is defeated, he cannot recover any compensation from the vendor for his services; and it is immaterial that he read over the conditions of sale to the seller, who approved of them. The same rule of course applies to negligence generally on the part of the auctioneer, whereby the sale is defeated (*c*)(2).

4. The auctioneer is, of course, entitled to a fair remuneration for his labor; the amount must generally depend upon private agreement, although where there is no special agreement, and there is a particular commission commonly charged, and the seller was aware of the custom, that would, no doubt, in most cases, be the measure of the allowance (*d*). Upon large sales this difficulty is mostly obviated by making a contract beforehand with the auctioneer. Mr. Justice Lawrence, upon one occasion, observed that considering the great sums of money which auctioneers were paid for preparing particulars and selling estates, they ought to be more correct. They contended some time ago, he added, that they were entitled to have the full sum of 5*l.* per cent. commission, even if a man advertise an estate to be sold by auction, and it was afterwards sold by private contract; and then they contended for half the full commission (*e*). It has since been decided, that if a contract be made to pay a given per centage on the sale by auction, but nothing if no sale, and the auctioneer take the usual steps preparatory to the sale, he is, by the custom of the trade,

(*a*) *Bratt v. Ellis*, MS.; *Jones v. Dyke*, MS. App. Nos. 4 and 5; and see *Nelson v. Aldridge*, 2 Stark. Ca. 435.

(*b*) See *Gaby v. Driver*, 2 You. & Jerv. 549.

(*c*) *Denew v. Deverall*, 3 Camp. Ca. 451; *Jones v. Nanney*, 13 Price, 76.

(*d*) See *Maltby v. Christie*, 1 Esp. Ca. 340.

(*e*) 3 Smith, 440 (1806).

(1) See *Dusenbury v. Ellis*, 3 John. Cas. 70.

(2) Where an auctioneer, in making an entry of a sale in his sale-book, omitted to comply with the requirements of the statute (of New York) regulating sales at public auction, in consequence of which the sale could not be enforced, and the owner of the property suffered a loss on the re-sale, it was held, that, the auctioneer being answerable only for gross negligence or ignorance, was not liable in damages: the act having been recently passed, being of doubtful construction, and not having received a judicial interpretation. *Hicks v. Minturn*, 19 Wendell, 550.

which is in law part of the contract, entitled to the commission, although the owner himself, or his solicitor, sell the property by private contract (*f*). This should be guarded against by express stipulation.

5. If several land-agents are employed to sell an estate, one who finds a purchaser may be entitled to a commission for so doing, although the purchase is made of another of the agents, who receives his commission; but the jury are not bound to give what *is termed the usual commission for finding a purchaser, viz., two per cent (*g*).

6. If an agent for sale of an estate is to be paid a per centage on the sum obtained, he cannot recover his commission until the money is received by the principal. If, therefore, it is paid into the bank under an Act of Parliament, by the authority of which the property was purchased, the commission is not recoverable until at least the seller's right to the money is ascertained, and it is owing to his wilful default that he has not received it (*h*).

7. If an attorney or agent bid more for an estate than he was empowered to do, he himself would be liable; but it seems that his principal would not (*i*). But unless he were expressly limited as to price, and not enabled to go beyond the limits of his authority, his principal would be bound (*k*).

8. Where the principal denies the authority, and the agent is compelled to perform the agreement himself, because he cannot prove the commission, he may afterwards file a bill against his principal; and if the principal deny the authority, an issue will be directed to try the fact; and if the authority be proved, the principal will be compelled to take the estate at the sum which he authorised the agent to bid (*l*). If the agent make the agreement in that character, and his authority is denied, and he pays the deposit, he may recover it back in his own name if a good title cannot be made (*m*). If the agency be established, the agent will be compelled to transfer the benefit of the contract to his principal, although he made the contract in his own name, and swears that it was on his own account (*n*).

(*f*) *Driver v. Cholmondeley*, 8 Carr. & Payn. 559, n.; *Rainy v. Vernon*, *ib.* 559.

(*g*) *Murray v. Currie*, 7 Carr. & Payn. 584.

(*h*) *Bull v. Price*, 7 Bing. 237; 5 Moo. & Pay. 2; and see *Cannon v. Kelly*, 1 Hayes & Jo. 655.

(*i*) See *Ambl.* 498; 10 *Ves. jun.* 400.

(*k*) *Hicks v. Harkin*, 4 Esp. Ca. 114. See *East India Company v. Hensley*, 1 Esp. Ca. 112.

(*l*) *Wyatt v. Allen*, MS. App. No. 6.

(*m*) *Langstroth v. Toulmin*, 3 Stark. Ca. 145.

(*n*) *Lees v. Nuttall*, 1 Russ. & Myl. 53; 2 Myl. & Kee. 819; *Taylor v. Salmon*, 4 Myl. & Cra. 134.

9. An agent employed to sell has no authority as such to receive payment of the purchase-money (*o*) (1); nor has an auctioneer, under common conditions, any authority to receive more than the deposit (*p*).

10. And if an auctioneer, being authorised to receive, give credit to the vendee, or take a bill or other security for the purchase-money, it is entirely at his own risk; the vendor can compel him to pay the money (*q*) (2). As between an agent for the seller and *a purchaser, it seems that an agent with an undisclosed principal may vary the terms of payment after the sale is completed; the principal may interfere at any time before payment, but not to rescind what has been before done. This is essential to the safety of the purchasers. But if a man sell, acting as a broker, the moment the sale is completed he is *functus officii*. The terms of the contract cannot then be altered, except by the authority of the principal (*r*).

11. But if the seller is indebted to his agent, whom he authorises to receive the money out of which he intends the agent should pay himself, the purchaser, to the extent of the agent's debt against the seller, may discharge the purchase-money by setting it off in account with the agent, if he is indebted to the purchaser; for this can make no difference to the seller if the agent takes care to receive in cash the balance due to the seller. A person, however, who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If, therefore, he pays by a settlement in account, he takes upon himself the risk of being able to show the debt due from the principal to the agent, and the specific circumstances under which the agent was appointed to receive the money (*s*).

(*o*) *Mynn v. Joliffe*, 1 Mood. & Rob. 326.

(*p*) See *Sykes v. Giles*, 5 Mees. & Wels. 615; a case of special conditions.

(*q*) *Williams v. Millington*, 1 II.

Blackst. 81. See *Wiltshire v. Sims*, 1 Camp. Ca. 258.

(*r*) See *Blackburn v. Scholes*, 2 Camp. Ca. 343.

(*s*) *Barker v. Greenwood*, 2 You. & Coll. 414.

(1) But see *Yerby v. Grisby*, 9 Leigh, 387; *Dunlap's Paley's Agency*, 279 in note; *Story, Agency*, § 108 and note; *Hackney v. Jones*, 3 Humph. 612.

Under a letter of attorney authorizing an agent to make sale of real estate and receive the purchase money, he has authority to execute the proper instrument required by law to carry the sale into effect. *Valentine v. Piper*, 22 Pick. 85. But he is not authorized in such case to make sale without receiving the money. *Falls v. Gaither*, 9 Porter, 605.

(2) See *State of Illinois v. Delatfield*, 8 Paige, 527; S. C. 26 Wendell, 192; S. C. 2 Hill, 160.

12. If the seller direct the purchaser to remit, or pay the purchase-money in a particular manner, as by the post, or to a banker's, the purchaser so remitting or paying the money will be discharged, although it be lost, if he have used due caution in the transaction (*t*) (1).

13. If a purchaser, instead of paying the deposit in cash, give a cheque for it, and he might have recovered the deposit if paid on account of a misdescription, for example,—the cheque, though not given without consideration, may be avoided; and therefore he may successfully defend an action upon the cheque (*u*).

14. If a purchaser pay his money to the agent of the vendor before the time when the latter is authorised to receive it, he makes that agent his own for the purpose of paying over the money to the right owner (*x*) (2).

15. If the seller for a valuable consideration direct his agent to *pay over the proceeds of the sale to a third person, he cannot revoke the order (*y*) (3).

16. A deposit is considered as a payment in part of the purchase-money (*z*), and not as a mere pledge, which was also the rule of the civil law where money was given; but if a ring or the like was given by way of earnest or pledge, it was to be returned (*a*).

17. The auctioneer should not part with the deposit until the sale be carried into effect (*b*); because he is considered a stakeholder, or depository of it (*c*). And the same rule would of course apply to a solicitor receiving a deposit (*d*). In a late case, where the auctioneer was also the attorney of the seller, and paid over the money to the seller after he knew that objections to the title had been raised, an action against him for the deposit was sus-

(*t*) *Warwick v. Noakes*, Peake's Ca. 67 a; *Hawkins v. Rutt*, *ib.* 186; *Eyles v. Ellis*, 4 Bing. 112.

(*u*) *Mills v. Oddy*, 6 Carr. & Payn. 728.

(*x*) See *Parnter v. Gaitskill*, 13 East, 432.

(*y*) *Metcalf v. Clough*, 2 Mann. & Ryl. 178.

(*z*) *Pordage v. Cole*, 1 Saund. 319; see *Main v. Melbourne*, 4 Ves. jun. 720; *Klinitz v. Surry*, 5 Esp. Ca. 207; *Am-*

brose v. Ambrose, 1 Cox, 194; *Palmer v. Temple*, 9 Adol. & Ell. 508; 1 Per. & Dav. 379.

(*a*) *Vinnius*, 1. 3, 24.

(*b*) *Burrough v. Skinner*, 5 Burr. 2639; *Berry v. Young*, 2 Esp. Ca. 640, n.; *Spurrier v. Elderton*, 5 Esp. Ca. 1; and see *post*, ch. 16.

(*c*) *Jones v. Edney*, *cor.* Lord Ellenborough, 4 Dec. 1812.

(*d*) *Wiggins v. Lord*, 4 Beav. 30.

(1) *Wakefield v. Lithgow*, 3 Mass. 249.

(2) *Story*, Agency, § 98. But see *Scott v. Irving*, 1 Adol. & Ellis, 605; *Dunlap's Paley's Agency*, 284 and note.

(3) See *Hunt v. Rousmanier*, 8 Wheat. 174; *Mansfield v. Mansfield*, 6 Conn. 559; *Wheeler v. Wheeler*, 9 Cowen, 34; *Story*, Agency, § 477, and note; *Dunlap's Paley's Agency*, 184, 185 and note.

tained, but the Judges cautiously abstained from pointing out the duty of an auctioneer in any other case (*e*). However, in a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective) might recover the deposit from the auctioneer (*f*). For the payment of the deposit depends upon the want of a good title being made out. If a good title is not made out, the purchaser becomes entitled to his deposit; and, in strictness, an action may be maintained for it without giving notice of the default to the auctioneer. (*g*).

18. If both the parties claim the deposit, the auctioneer may file a bill of interpleader, and pray for an injunction, which will be granted, upon payment into court of the deposit (*h*).

19. But if after the sale of the estate, and payment of a deposit to the auctioneer, the estate be again sold to another purchaser who also pays a deposit to the same auctioneer, and the seller bring an action against the auctioneer for both deposits, and each purchaser insists upon his contract, the auctioneer cannot mix up the cases of the seller and the two purchasers in one bill of interpleader (*i*).

*20. An auctioneer cannot maintain a bill of interpleader if he insist upon retaining out of the deposit either his commission or the auction duty; for interpleader is where the plaintiff is the holder of a stake which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the defendants (*k*) (1).

21. If upon a bill filed for an injunction, the Court order the deposit to be paid into court, it will, it seems, be after deducting the auctioneer's charges and expenses (*l*), although perhaps this deserves re-consideration: for the purchaser's deposit may not ultimately be the fund out of which those charges are to be paid;

(*e*) See *Edwards v. Hodding*, 5 Taunt. 303; 1 Dan. 64.
 815; 1 Marsh. 377. (*i*) *Hoggart v. Cutts*, 1 Cra. & Phil.
 (*f*) *Gray v. Gutteridge*, 1 Mann. & 197.
 Ryl. 614. (*k*) *Mitchell v. Hayne*, 2 Sim. & Stu.
 (*g*) *Duncan v. Cafe*, 2 Mees. & Wels. 63; see 11 Sim. 28.
 244. (*l*) *Annesley v. Muggridge*, 1 Madd.
 (*h*) *Farebrother v. Prattent*, 5 Price, 593.

(1) 3 Dan. Ch. Pr. 1753, 1754.

but this is done without prejudice to any question as to so much of the deposit as is retained (*m*) (1).

22. Under the Interpleader Act (*n*), by which authority is given to a court of law to make such order between such defendant and the plaintiff as to costs and other matters as may appear just and reasonable, the Court has gone the length of saying, that in the first instance, upon application for a rule to interplead, the fund shall bear the costs, and the party in the wrong shall afterwards make up the fund (*o*). This operates severely against the right of a purchaser entitled to a return of his deposit.

23. And in a case where the action was brought by the purchaser against the *auctioneer*, and the seller had brought an action against the *purchaser* for the residue of the purchase-money, and the Court had ordered the money into court and directed the seller to proceed with his action, but he failed to do so and became insolvent, the Court under the Act, directed that the seller's claim against the auctioneer should be barred. The question then arose as to the stakeholder's costs, and the Court allowed him to take them out of the fund in court, that is, out of the deposit which belonged to the purchaser, and left the latter to his right of action against the insolvent seller for having subjected the purchaser's deposit to this deduction, and the Court refused to take into account that the seller was insolvent (*p*).

24. In a case where 1,000*l.* was paid as a deposit to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of the deposit into court, and *the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded, and the day named for payment of the money into court was subsequent to the bankruptcy (*q*). And perhaps a loss by the insolvency of the auctioneer will, in every case, fall on the vendor, who nominates him, and whose agent he properly is (*r*).

25. And unless an auctioneer disclose the name of his principal,

(*m*) *Yates v. Farebrother*, 4 Madd. 239.

(*n*) 1 & 2 Will. 4, c. 58.

(*o*) 4 Bing. N. C. 723.

(*p*) *Pitchers v. Edney*, 4 Bing. N. C. 721.

(*q*) *Brown v. Fenton, et c. cont.* Rolls, 23

June 1807, MS.; S. C. 14 Ves. jun. 144.

(*r*) See 2 H. Blakst. 592; 13 Ves. jun. 602; 14 Ves. jun. 150; *Amesley v. Muggridge*, 1 Madd. 593; *Smith v. Lloyd*, 1 Madd. 618.

an action will lie against him for damages on breach of contract (s) (1).

26. Generally speaking, an auctioneer is not liable for interest ; but that subject will be considered fully in the chapter on interest (t).

27. An auctioneer being only an agent, may safely pay over the proceeds of the sale to the seller, his principal, although the latter is to his knowledge in embarrassed circumstances (u) (1). It must be a very special case in which he can set up the *jus tertii* (x) (2).

28. Where a man is completely the agent of the vendor, a payment to him is in law a payment to the principal ; and in an action against the latter for recovery of the deposit, it is immaterial whether it has actually been paid over to him or not (y) (3).

29. If, pending a suit for specific performance, a deposit be laid out in the public funds, under the authority of the Court, it will be binding on both vendor and vendee ; and, if laid out without opposition by the seller, it must be presumed to be with his assent ; and, in either case, he must take the stock as he finds it (z).

30. If a purchaser is entitled to a return of his deposit, he is not compellable to take the stock in which it may have been invested, unless such investment were made under the authority of the Court, or with his assent. And an assent will not be implied against a party because notice was given to him of the investment, to which *he made no reply (a). Therefore, where the deposit is considerable, and it is probable that the purchase may not be completed for a

(s) *Hanson v. Roberdeau*, Peake's Ca. Ross. 298.

120 ; see *Simon v. Motivos*, 3 Burr. 1921 ;
Owen v. Gooch, 2 Esp. Ca. 567 ; 12 Ves.
 jun. 552, 481.

(t) *Post*, ch. 16, s. 1.

(u) *White v. Bartlett*, 9 Bing. 378 ; 2
 Moo. & S. 515.

(x) *Crosskey v. Mills*, 1 Cro. Mees. &

(y) *Duke of Norfolk v. Worthy*, 1
 Camp. N. P. 337.

(z) *Poole v. Rudd*, 3 Bro. C. C. 49 ;
 and see *Doyle v. the Countess of Powis*,
 2 Bro. C. C. 32 ; 1 Cox, 206.

(a) *Roberts v. Massey*, 13 Ves. jun.
 561 ; *McCann v. Forbes*, 1 Hogan, 13.

(1) If a man obtain possession of goods by fraud between him and the owner, which an auctioneer sell for him, the auctioneer cannot safely pay over the proceeds to his principal after notice from the assignees of the insolvent owner ; *Hardman v. Willcock*, 9 Bing. 382, n.

(1) 2 Kent, (6th ed.) 630 et seq. ; *Dunlap's Paley's Agency*, 372, 373, and in notes ; *Mills v. Hunt*, 20 Wendell, 431 ; *Mauri v. Heffernan*, 13 John. 58 ; *McComb v. Wright*, 4 John. Ch. 659 ; *Story, Agency*, §267 ; *Jones v. Littledale*, 6 Adol. & Ellis, 486.

(2) *Story, Agency*, §217 ; *Dunlap's Paley's Agency*, 10, 390 ; *Jacob's case*, 2 Bay, 84 ; *Parkist v. Alexander*, 1 John. Ch. 394 ; *Holbrook v. Wight*, 24 Wendell, 169.

(3) See *Bamford v. Shuttleworth*, 11 Adol. & Ellis, 926 ; *Taber v. Perrott*, 2 Gallison, 565.

long time, it seems advisable for the parties to enter into some arrangement for the investment of the deposit.

31. As a vendor will not be subject to any loss by the investment of the purchase-money in the funds without his assent, so he will not be entitled to any benefit by a rise in the funds, although the purchaser gave him notice of the investment; unless he (the vendor) agreed to be bound by the appropriation. Sir William Grant has observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot, by depositing the money with his bankers, throw the risk of their credit upon the other parties. They are not called upon to express their opinion of that bank, or to say anything upon the subject. There is no difference between that and a deposit at the Bank of England, or a conversion of the money into stock; as the one party has no more right to make the other consent to have the fund laid out in stock than in a private bank (*b*).

32. No objection can be made to the whole of the deposit required by the conditions not being paid by the purchaser, if the vendor, after the sale, agree to accept a less sum (*c*).

33. A purchaser has no right to elect to put an end to the agreement by forfeiting the deposit (*d*) (1).

34. Although the deposit be forfeited at law, yet equity will, in general, relieve the purchaser, upon his putting the vendor in the same situation as he would have been in, had the contract been preformed at the time agreed upon (*e*). But if a bill by a purchaser for a specific performance is dismissed, the Court cannot order the deposit to be returned: as that would be decreeing relief (*f*).

35. Where the *seller* files the bill, he submits to the jurisdiction, and although his bill is dismissed, the Court will compel him to repay the deposit, and with interest, where that ought to be paid. This was first decided by Lord Eldon, and has since been followed by other judges (*g*).

(*b*) *Roberts v. Massey, ubi sup*; *Acland v. Gainsford*, 2 Mad. 28.

(*c*) *Hanson v. Roberdeau*, Peake's Ca. 120. See *ex parte Gwyne*, 12 Ves. jun. 378; and 1 Camp. Ca. 427.

(*d*) *Crutchley v. Jerningham*, 2 Mer. 506; see *Palmer v. Temple*, 9 Adol. & Ell. 520; *Savile v. Savile*, 1 P. Wms. 745.

(*e*) *Vernon v. Stephens*, P. Wms. 66; *Moss v. Matthews*, 3 Ves. jun. 279.

(*f*) *Bennet College v. Carey*, 3 Bro. C. C. 390.

(*g*) See *Butler v. Lord Portarlington*, 1 Dru. & War. 65; *Graves v. Wright*, 2 Dru. & War. 77.

(1) See *Wood v. Mann*, 3 Sumner, 317.

*SECTION V.

OF SALES BY PRIVATE CONTRACT.

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|---|---|
| <ol style="list-style-type: none"> 1. <i>Printed conditions and agreement.</i> 2. <i>Written agreement ; letters.</i> 3. <i>Previous representations at an end.</i> 4. <i>Unless there be fraud.</i> 5. <i>Purchase completed by agent binding
although contract not in writing.</i> 7. <i>Where agent binds himself.</i> 8. <i>Personal undertaking by solicitor.</i> | <ol style="list-style-type: none"> 9. <i>Attested copies of parcels where sale
is in lots.</i> 10. <i>Contract to procure a purchaser.</i> 11. <i>Waiver of contract on compromise by
the other party with his creditors.</i> 12. <i>Purchaser liable for nuisance on the
estate.</i> |
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1. IN regard to sales by private contract, all such of the foregoing observations as do not apply exclusively to sales by auction are equally applicable to sales by private contract. But it is seldom that a seller can obtain the introduction into an agreement of an unusual stipulation. There is no competition at the moment, and the price being agreed upon, the terms of the contract follow the usual practice. The attempt to introduce an unusual condition would in many cases put an end to the treaty. Where it is really important to a seller that he should be guarded in the sale by special conditions, the best plan would be to have the particulars of the estate with the conditions printed, adapting them to a private sale with a printed form of an agreement at the end. Persons desirous of treating for the estate would thus know beforehand upon what conditions the sale was to be made, and would not be likely, if they did make an offer, to object to be bound by them.

2. As soon as the treaty is concluded, a regular written agreement should be signed by both parties, containing the names of the seller and buyer, the description of the estate and the price, with the usual stipulations (*a*). Letters, as we shall see, may amount to a sufficient agreement. They are often relied upon, where it is feared by either party that the other will withdraw if the matter is prolonged. But they generally lead to litigation.

3. We shall see that after a contract is executed, what passed between the parties cannot be adverted to (except as a defence against a specific performance), because what passed between the

(*a*) See a form of an agreement, Appendix, No. 6.

parties in their communication may have been altered and shifted in a variety of ways, but what they signed and sealed was finally settled. It would destroy all trust; it would destroy all security, and lay it open, unless the parties are completely bound by what they sign and seal. This was laid down at law by Lord Loughborough (*b*).

4. And in a later case, it was said to be in vain to reduce a contract to writing if you may afterwards refer to all that has passed by parol. But fraud is an exception. One learned judge held, that where parties come to an understanding, and reduce the contract to writing, by that alone they are afterwards to be bound, unless some fraud can be shown. Even if there had been a representation it would not avail. He held that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortens and corrects the representation, and whatever terms are not contained in the contract do not bind the seller, and must be struck out of the case (*c*) (1).

5. But fraud is admitted to be an exception. In the above case the opinion of the Court was, that mere representations, not embodied into the contract, were not a fraud. Where the representations do amount to a fraud, the purchaser, although the contract is silent on that head, has been allowed to recover damages (*d*), or to avoid the contract (*e*) (2).

6. If a man at the request of another enter into a contract for a purchase, and pay the price and obtain the subject, the principal cannot, in answer to an action for the money paid to his use, object that the contract was not in writing as required by the statute of frauds (*f*).

7. As agreements for sale of estates are generally entered into by the attorneys of the parties, it may, in this place, be proper to observe, that where an attorney enters into an agreement on behalf

(*b*) *Haynes v. Hare*, 1 H. Blackst. 664. 316; *Fuller v. Wilson*, 3 Adol. & Ell. N.

(*c*) *Pickering v. Dowson*, 4 Taunt. 779; S. 58, 68, *post*, ch. 4, s. 5.

post.

(*e*) *Hutchinson v. Morley*, 7 Scott, 341.

(*d*) *Stevens v. Dobell*, 3 Barn. & Cress. 623; *Taylor v. Green*, 8 Carr. & Pay.

(*f*) *Pawle v. Gun*, 4 Bing. N. C. 445.

(1) See 1 Greenl. Ev. § 281.

(2) Per Story, J. in *Hough v. Richardson*, 3 Story C. C. 690; *Chitty Contr.* (8th Am. ed.) 588, 589 and notes; *Cochrane v. Cummings*, 4 Dall. 250; *Prentiss v. Russ*, 4 Shepley, 30; *Smith v. Richards*, 13 Peters, 26; *Doggett v. Emerson*, 3 Story C. C. 733; *Daniel v. Mitchell*, 1 ib. 172; *Matthews v. Bliss*, 22 Pick. 48; *Morris Canal Co. v. Everett*, 9 Paige, 168; *Stebbins v. Eddy*, 4 Mason, 414; *Hazard v. Irwin*, 18 Pick. 85.

of his principal, the agreement should be made and signed in the name of the principal, by him as attorney: for if an attorney covenant in *his own* name for *himself, his heirs, &c.*, he will himself be personally bound, though he be described in the instrument as covenanting for and on the part of his principal (g) (1).

*8. A personal undertaking by a solicitor at a sale to procure certain evidence of the title, &c. cannot be enforced in a summary way under the summary jurisdiction of the Court (h).

9. Where an estate is sold in lots, whether by public auction or private contract, it may be advisable for the vendor to take attested

(g) *Appleton v. Binks*, 5 East, 148; *Morris*, 2 Taunt. 375; *Pell v. Stephens*, 2 Kendry *v. Hodson*, 5 Esp. Ca. 228; *My. & Kee*, 334; *Gaby v. Driver*, 2 You. Norton *v. Herron*, 1 Ry. & Mood. 229; & Jerv. 549; *Jones v. Littledale*, 6 Adol. S. C. 1 Carr. & P. 648; *Spittle v. Laver-* & Ell. 486; *Magee v. Atkinson*, 2 Mees. der, 1 Moore, 270; *Gray v. Gutteridge*, 1 & Wels. 440. Man. & Ry. 614. See *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337; *Bowen v.*

(h) *Peart v. Bushell*, 2 Sim. 38.

(1) In *Mears v. Morrison*, 1 Breeze, 172, it is said that the *usual* and *appropriate* mode of executing a deed or other writing by an agent or attorney, is for the agent or attorney to sign his principal's name, and then his own as agent or attorney. Signing in the following manner, without mentioning the name of the principal, is not binding on the principal; to wit, "A. B., agent." No particular form of words, however, is *necessary*; but the capacity in which the agent acts must appear from the face of the instrument; and where this is the case, it is sufficient. *Magill v. Hinsdale*, 6 Conn. 464. If the name of the principal be signed, it seems to be indifferent, whether it be before or after that of the attorney. *Id.*; *Campbell v. Baker*, 2 Watts, 83; *Hovey v. Magill*, 8 Conn. 680; *Shelton v. Darling*, 2 Conn. 435. See also *Stinchfield v. Little*, 1 Greenl. 231; *Elwell v. Shaw*, 1 Greenl. 339; S. P. 16 Mass. 42; *Johnson v. Johnson*, 1 Dana, 368; *Fowler v. Shearer*, 7 Mass. 14; *Copeland v. Mercantile Ins. Co.* 6 Pick. 198; *Stackpole v. Arnold*, 11 Mass. 27; *Tucker v. Bass*, 5 Mass. 164; *Clapp v. Day*, 2 Greenl. 30; *Key v. Panham*, 6 Harr. & John. 418; *Spencer v. Field*, 10 Wendell, 87; *Dunlap's Paley's Agency*, 180 et seq. 378 et seq. and notes; *Clark v. Courtney*, 5 Peters, 318; *Marey v. Beckman Iron Co.* 9 Paige, 188; *Skinner v. Dayton*, 19 John 568; *Townsend v. Cowing*, 23 Wendell, 435; *North River Bank v. Aquee*, 3 Hill, 263; *Bradlee v. Boston Manf. Co.* 16 Pick. 347; *Minard v. Mead*, 7 Wendell, 78; *Heffernan v. Adams*, 7 Watts, 116; *Grubbs v. Wiley*, 9 Smiles & Marsh. 29. If a bond sets forth that A. B. as agent for C. D., legally appointed for that purpose, binds the said C. D. to make title, &c. and it is executed thus, "A. B. (as) agent for C. D." it is the deed of C. D. provided the agent's authority is sufficient. *Deming v. Bullitt*, 1 Blackf. 241; *Hunter v. Miller*, 6 B. Monroe, 612. The rule of law, that an agent binds himself and not his principal, unless he use the name of the principal, applies only to *sealed instruments*. In contracts not under seal, if the agent intend to bind his principal and not himself, it will be sufficient if it appear in such contract that he acts as agent. *Andrews v. Este*, 2 Fairf. 267; N. Eng. Marine Ins. Co. *v. DeWolf*, 8 Pick. 56; *Rice v. Gove*, 22 Pick. 158, 161; *Townsend v. Cowing*, 23 Wendell, 435; *Townsend v. Hubbard*, 4 Hill, 354; *Evans v. Wells*, 22 Wendell, 324. In *Morse v. Green*, 13 N. Hamp. 32, it was held, that if the agent be authorized to subscribe the name of his principal to a note, the fact need not appear in the note, but may be proved by parol. The rule, in reference to the mode of executing an instrument by an agent, seems also to be relaxed in the case of a sealed contract where the seal is not necessary to the validity of the instrument. *Evans v. Wells*, 22 Wendell, 234. See *Lawrence v. Taylor*, 5 Hill, 107, 113; *Tapley v. Butterfield*, 1 Metcalf, 315; *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 N. Hamp. 205, 234 to 238.

copies of the parcels included in the different conveyances; in order to satisfy a cautious purchaser of any part of the estate, that no part of the estate bought by him is included in any of the conveyances to the other purchasers.

10. It may here be observed, that if a man agree to get another so much for his estate, and actually provide a purchaser with whom the owner agrees for the sale of the property, at the sum stipulated, and a deposit is paid, the first agreement will be performed, although the purchaser cannot perform the agreement, if the seller let him off, and retain the deposit as a forfeiture (*i*).

11. Where a man had bought an estate and paid a deposit, but the title had not been made out, and being desirous of compromising with his creditors, he applied to the seller to cancel the contract and return the deposit, which the latter refused to do, but said that he would never sue the purchaser on the contract, and thereupon the compromise with the creditors proceeded; it was held that it would have been a fraud in the seller if he had attempted to enforce the contract, and therefore the purchaser was not allowed to recover the deposit, although the title had not been made out (*j*).

12. A purchaser should be cautious in buying a property where a nuisance exists; for if a nuisance be created, and a man purchases the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability; yet, in such a case, if there was only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had created the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it (*k*).

(*i*) *Horford v. Wilson*, 1 Taunt. 12.

(*k*) *The King v. Pedley*, 1 Adol. & Ell.

(*j*) *Clark v. Upton*, 3 Mann. & Ryl. 89. 827, *per* Littledale, J.

*SECTION VI.

OF SALES BY PERSONS NOT BEING OWNERS.

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| 2. Valuation of property. | 24. Assignees putting up an estate. |
| 4. May sell privately, or by auction. | 26. Deposit repaid without a bill filed. |
| 5. Insolvents' estates to be sold by auction. | 27. Biddings for bankrupt's estate opened. |
| 7. Assignees of bankrupts not to delay sale. | 28. Power to mortgagee to sell. |
| 8. Sale by private contract not within authority to sell by auction. | 31. Liability to make a good title. |
| 9. Sale in lots. | 32. And compensation for misdescription. |
| 11. Sale by auction valid although not at full price. | 33. Cannot sell to themselves. |
| 12. Trustees must use reasonable diligence. | 34. Trustee of legal estate to convey to trustees to sell. |
| 14. Time of sale. | 35. Tenant for life, when entitled to rents. |
| 15. Where sale will be stopped. | 36. Sales by trustees under powers of sale and exchange. |
| 18. False representation by trustee. | 37. Cannot be controlled : how to sell. |
| 19. Conditions of sale. | 38. Sale and new purchase by tenant for life. |
| 21. Where assignee may buy in. | 39. Their contract binds the estate. |
| 22. Where they may have a reserved bidding. | 40. Trustees' liability to costs. |
| 23. Where damages against the assignees fall on the estate. | |
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1. WHERE the seller is a trustee for sale, an assignee of a bankrupt or insolvent, or a mortgagee with a power to sell, he has to consider not only his obligations to the purchaser, but also his liabilities to his *cestui que trusts* or mortgagor.

2. Of course trustees should satisfy themselves of the value of the property they are empowered to sell ; and although it certainly is not necessary in every case to have a valuation made, yet they will be justified in taking that step, and not allowing the estate to go for less than the valuation (a), but at last trustees, like other sellers, must be guided by that common proof of value, that a thing is worth what it will fetch.

3. Lord Eldon observed, upon the usual words, that the trustees

(a) See 5 Ves. jun. 680, 681.

may sell for such price as shall appear to them to be reasonable, that that expression must be construed, at least in a question *between the trustees and the *cestui que trust*, after they have with due diligence examined (b).

4. A sale by trustees, &c. may, unless there be a restriction, be made by private contract or by public auction. Even in the case of assignees of bankrupts, there is nothing in the statutes to prevent them from selling by private contract; it may be frequently advantageous for the creditors, and with their consent would be unobjectionable. It is however a circumstance of evidence not to be disregarded upon a complaint that the property, by a different mode of disposing of it, might have been rendered more productive (c).

5. The real estate of an insolvent however is directed to be sold by public auction, with the sanction of the creditors (d). But if the scheme of selling by auction has been tried and failed, the assignees are justified in selling by private contract (e). And a purchaser may be bound, although the assignee may not have strictly followed the directions of the creditors (f).

6. The insolvent's estate is to be sold within six months after the appointment of the assignee, or within such other time as the court for the relief of insolvents shall direct (g).

7. The bankrupt's estate should be sold without delay, and assignees will not be justified in postponing the sale against the demand of any individual creditor (h). There appears to have been a difference of opinion between Lord Thurlow and Lord Eldon upon the point whether the Lord Chancellor had power to postpone the sale against the demand of a creditor (i), although Lord Eldon fully assented to Lord Thurlow's doctrine as a general rule (k).

8. A sale by private contract by an *agent* authorised to sell by auction is not valid, although the price be greater than was required (l), nor could such a sale by trustees in the like case be supported.

9. The sale may be made in lots or altogether, as may be deemed most advantageous.

(b) 10 Ves. jun. 309; as to rights of pre-emption given through trustees, see 11 Ves. jun. 454, 455, and *post*, ch. 4.

(c) *Per* Lord Eldon, *ex parte* Dunman, 2 Rose, 66.

(d) 1 & 2 Vict. c. 110, s. 42, 47, 48.

(e) *Mather v. Priestman*, 9 Sim. 352.

(f) *Wright v. Maunder*, 4 Beav. 512; and see *Borell v. Dann*, 2 Hare, 440.

(g) Sect. 47; see *Doe v. Evans*, 1 Crompt. & Mees. 450.

(h) *Ex parte* Goring, 1 Ves. jun. 168.

(i) *Ex parte* Kendall, 17 Ves. jun. 519, 522.

(k) See 6 Ves. jun. 622, 623.

(l) *Daniel v. Adams*, Ambler 495; see *post*, ch. 4.

10. Where a trust estate was put up to sale by auction in several lots, upon the deliberate opinion of the auctioneer that the estate would sell most advantageously in lots, and such sale *having been tried without effect, the estate was put up at the same sale in one lot and sold, so that competition was not invited by any previous notice that *such* a sale would take place, the purchaser was, upon slight circumstances, refused a specific performance (*m*).

11. Where the sale by trustees, &c. is made by auction, with all those circumstances of caution which a provident owner would have applied in the case of his own property, it would form no objection to the specific performance of the contract that the estate had not obtained a full price. Those who sell by auction submit themselves to the chance of competition, and must abide by it (*n*).

12. Every trust deed for sale is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price; and that in the execution of the trust they will pay equal and fair attention to the interest of all persons concerned. If trustees or those who act by their authority fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust at the expense of another party, a court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser, but he has no claim to the assistance of a court of equity (*o*).

13. There have been cases, Lord Eldon observed, upon contracts by trustees to sell, which is the situation of assignees, where the Court has said, not that it will order the contracts to be cancelled, but that if the trustee has been negligent, not taking that care to preserve the interest of his *cestui que trusts* which he ought to have done, it will not permit the party dealing with him to take advantage of that negligence: if he was dealing with one whom he knew to have a duty, and if that duty was plainly neglected, the contract will not be enforced (*p*).

(*m*) *Ord v. Noel*, 5 Madd. 438; see 441; *Bridger v. Rice*, 1 Jac. & Walk. 74; vide *post*, ch. 4.

(*n*) *Per* Leach, V. C.; *Ord v. Noel*, 5 Madd. 440; see 3 Mer. 208.

(*o*) *Per* Leach, V. C. 5 Madd. 440, & Fin. 766.

14. The usual direction is, to sell with all convenient speed, which is no more than the ordinary duty implied in a trustee, and there must necessarily be some discretion which the trustee may *safely exercise (*q*) ; and if there are several trustees, one is not bound to surrender his opinion as to the fittest time of sale to the other (*r*) ; and acting providently, they may buy in the estate ; but trustees who do buy in an estate and delay the resale, incur a great risk of answering for any loss which may be sustained (*s*). Where the trust is for sale with a view to a conversion out and out, the trustees must sell at once, and will not be justified in first mortgaging the property (*t*).

15. The Court has refused to stay a sale by trustees, although to be made the next day, and the notice of the intended sale was alleged to be much shorter than usual, because this was not one of the cases in which, on account of irreparable injury to the plaintiff, the Court proceeds in this summary way. If the trustees should be guilty of a breach of trust in making the proposed sale, they will be answerable to the *cestui que trust* for the damage sustained (*u*). But in a later case, where a trustee to sell in a mortgage had not apprised the mortgagor of his intention to proceed to a sale, and it being his duty to attend equally to the interest of both *cestui que trusts*, and to apprise both of the intention to sell, so that each might take the means to procure an advantageous sale, the Court stopped the sale. If the trust for sale had been in the mortgagee himself, the Court thought that the mortgagor might, where due notice had not been given so as to afford a fair probability of an advantageous sale, relieve himself by giving notice to the purchaser that he had filed a bill to impeach the sale, and that it was better to put him to the inconvenience of an additional party to his suit than to risk a possible injury to the mortgagee by interrupting the sale (*r*).

Injunctions ought not to be granted upon slight grounds in such cases, but the opinion above quoted of Sir John Leach's, as to giving notice instead of applying for an injunction, was one upon which he frequently acted in other cases, but the rule was always disapproved of by Lord Eldon.

16. Although a trust for sale has been established by decree,

(*q*) *Garrett v. Noble*, 6 Sim. 504 ;
Buxton v. Buxton, 1 Myl. & Cra. 80.

(*r*) *Buxton v. Buxton*, 1 Myl. & Cra. 80.

(*s*) See *Taylor v. Tabrum*, 6 Sim. 281.
Qu. If not heard upon appeal.

(*t*) *Haldenby v. Spofforth*, 1 Beav. 390.

(*u*) *Sir John Pechel v. Fowler*, 2 Anstr. 542.

(*x*) *Anon.* 6 Madd. 10.

yet if there be an appeal, the Court will, in a proper case, stop the sale until the final decision (*y*).

*17. If a bill is filed for the execution of the trust, a sale cannot be made without the leave of the Court (*z*).

18. If a trustee falsely represent the state of the incumbrances to a purchaser, he would, as we have seen, be bound to make good the loss sustained through his misrepresentation (*a*).

19. Although a man selling his own property may sell subject to such conditions as he pleases, yet trustees and assignees cannot impose any conditions for the benefit of the creator of the trust or the bankrupt, which would reduce the value of the property (*b*) (1). But strict conditions of sale, although somewhat unusual, will not lightly be deemed of such a depreciating character as to amount to a breach of trust or constitute an objection to the title (*c*).

20. And all the trustees should see that the sale is duly made, for they will be responsible for the act of any to whom they delegate the duty (*d*). For where several trustees sell, although there is the usual clause that each shall be liable only for his own receipts and defaults, yet if they allow one of them to receive and retain the purchase-money, they will be answerable for any loss occasioned by his dishonesty or insolvency (*e*). As soon as a trustee is fixed with knowledge that his co-trustee is misapplying the

(*g*) *Jenkins v. Herries*, whilst depending in Dom. Proc. MS.

(*z*) *Walker v. Smallwood*, Amb. 676.

(*a*) See *supra*, p. 5, 6.

(*b*) See 3 Mer. 268; *Robinson v. Musgrove*, 2 Mood. & Rob. 92.

(*c*) *Hobson v. Bell*, 9 Sim. 17.

(*d*) See 8 Price, 166, 167.

(*e*) *Bone v. Cook*, 13 Price, 332; *M'Clel.* 168; see *Brice v. Stokes*, 11 Ves. jun. 319.

(1) In *Goodale v. Wheeler et al.*, 11 N. Hamp. 424, the case was, that a town having a right in a meeting-house, voted to sell it by auction, upon certain terms of sale prescribed by them, and appointed the defendants a committee for that purpose. They accordingly advertised the property, and in addition to the conditions prescribed by the town, they provided that \$20 of the purchase-money should be paid at the time of the sale, to be forfeited to the town, if the purchaser should not complete the contract. The plaintiff was the highest bidder, but refused to make the deposit required, and the defendants thereupon refused to make a conveyance of the property to him. The plaintiff then brought a suit, on account of such refusal by the defendants; and it was decided by the court that it was competent for the defendants to require the deposit to be made, as it was calculated to enable them to effect the purpose of the town by ensuring a sale; and that, as the plaintiff had not made the deposit, this action could not be maintained. The court, however, farther decided, that even if the defendants had no authority to require the deposit to be made, for a refusal to convey, they would be liable to no persons but their employers. In reference to this last point, the court said: — "If they," [the defendants] "had refused to convey, so that the town lost the opportunity of selling the property, the town would have a remedy against them by action." "It does not appear that the town have complained of their conduct; and as they are satisfied with the acts of their agents, no other person has any right of action." 11 N. Hamp. 430.

money, a duty is imposed upon him to bring it back into the joint custody of those who ought to take better care of it (*f*) (1).

21. An assignee of a bankrupt may buy in an estate with the previous consent or subsequent approbation of the creditors (*g*) ; but if he do so of his own authority he will be deemed the purchaser, and held to the bargain (*h*) (2).

22. Upon a sale under an order in bankruptcy upon a petition by the mortgagee, the assignees are not allowed to have a mere reserved bidding, and if they buy in the estate without authority they will be held to the purchase (*i*). If they desire actually to bid for the property they may have permission, but then the pro-

(*f*) 11 Ves. jun. 327 ; *per* Lord Eldon.

(*g*) *Ex parte* Buxton, 1 Gly. & Jam. 1816 ; MS. App. No. 11 ; *ex parte* Lucas, 1 Mont. & Ayr. 93.

355.
(*h*) *Ex parte* Lewis, *ib.* 69.

(1) See *Worth v. M'Aden*, 1 Dev. & Bat. Eq. 199. The general rule in reference to the responsibility of several trustees for the acts of each other, is that they are not so liable, unless they have made some agreement, by which they have expressly agreed to be bound for each other ; or they have by their own voluntary co-operation or connivance, enabled one or more to accomplish some known object in violation of the trust. 2 Story Eq. Jur. § 1280. It certainly is the duty of a co-trustee, in case of a joint trust, to exercise due caution and vigilance in respect to the approval of, and acquiescence in, the acts of his co-trustees ; for, if he should deliver over the whole management to the others, and betray supine indifference, or gross negligence, in regard to the interests of the *cestui que* trust, he will be responsible. 2 Story Eq. Jur. § 1275.

Still the mere fact that trustees, who are authorized to sell land for money, or to receive money, jointly execute a receipt therefor to the party, who is debtor or purchaser, will not ordinarily make either liable, except for so much of the money, as has been received by him ; although ordinarily in the case of executors it would be different, 2 Story Eq. Jur. § 1280. But wherever a trustee, by his own negligence or laches, suffers his co-trustee to receive and waste the trust-fund, when he has the means of preventing such receipt and waste, by the exercise of reasonable care and diligence, then, and in such a case, such trustee will be held personally responsible for the loss, occasioned by such receipt and waste of his co-trustee. 2 Story Eq. Jur. § 1283 ; *Clark v. Clark*, 8 Paige, 152 ; *Edmonds v. Crenshaw*, 14 Peters, 166. Again, if, by any positive act, direction or agreement, of one joint trustee, the trust money is paid over, and comes into the hands of the other, when it might and should have been otherwise controlled or secured by both ; there each of them will be held chargeable for the whole. 2 Story Eq. Jur. § 1284. So if one trustee should wrongfully suffer the other to detain the trust money a long time in his own hands, without security ; or should lend it to the other on his simple note ; or should join with the other in lending it to a tradesman upon insufficient security, in all such cases he will be deemed liable for any loss. *A fortiori*, one trustee will be liable, who has connived at, or been privy to, an embezzlement of the trust money by another ; or if it is mutually agreed between them, that one shall have the exclusive management of one part of the trust property, and the other of the other part. 2 Story Eq. Jur. § 1284. See *Monell v. Monell*, 5 John. Ch. 296 ; *Sutherland v. Brush*, 7 John. Ch. 22 ; *Sadler v. Hobbs*, 2 Brown Ch. Rep. (Perkins's ed.) 116, 117 and notes and cases cited ; *Ochiltree v. Wright*, 1 Dev. & Bat. 336 ; *Williams v. Maitland*, 1 Fredell Eq. 93 ; *O'Neill v. Herbert*, C. W. Dud. Eq. 30 ; *M'Nair's Appeal*, 4 Rawle, 157.

(2) So an auctioneer, if he bid for himself, may if the principal chooses, upon notice of the fact, hold the auctioneer to his bid, as purchaser at the sale ; and the auctioneer when he purchases, purchases at his own risk and peril, *Veazie v. Williams*, 3 Story C. C. 625.

perty may be knocked down to them as the real buyers (*k*) ; nor upon the sale of unincumbered property can the assignees have leave to bid unless under very special circumstances. A majority of the creditors present at a meeting summoned for the purpose cannot bind the minority (*l*).

*23. If assignees contract to sell subject to the approbation of the creditors, and the creditors approve, and consent to the contract, and afterwards the contract is resisted on the part of the estate, the damages, if any be recovered by the purchaser, must, as between the assignees and the estate, be paid out of the estate, and not by the assignees (*m*).

24. It is well settled, that assignees of a bankrupt are not bound to take what Lord Kenyon calls a *damnosa hereditas*, property of the bankrupt, which, so far from being valuable, would be a charge to the creditors ; but they may make their election ; if, however, they do elect to take the property, they cannot afterwards renounce it, because it turns out to be a bad bargain (*n*). This observation is made as an introduction to a case (*o*), in which it was decided that the assignees of a bankrupt could not be charged as assignees of the lease, where they had not entered into actual possession, but merely put up the property to sale by auction without stating to whom it belonged, or on whose behalf it was sold, and no person bid at the sale : the Court considered this as a mere experiment to enable the assignees to judge, whether the lease were beneficial or not, and compared it to a valuation by a surveyor ; but where upon a sale by assignees they received a deposit, but the purchaser refusing to complete his purchase, a second sale was resorted to without success ; yet, as there had been a sale, and a deposit paid, the Court, in the absence of evidence why they did not enforce the contract of sale, presumed that it was in force, and held that the contract of sale fixed them with possession (*p*).

25. If the assignees do accept the property, the bankrupt is by a late act (*q*) relieved from the rent and covenants, and if the assignees decline the same, the bankrupt is not to be liable in case he deliver up the lease to the lessor within fourteen days, and the

(*k*) *In re Skinner*, 1 Mont. & Ayr. 81.

(*l*) *Ex parte Beaumont*, 1 Mont. & Ayr. 304.

(*m*) *Turner v. Harvey*, Jac. 178.

(*n*) See 7 East, 342.

(*o*) *Turner v. Richardson*, 7 East, 326 ;

Wheeler v. Bramah, 3 Camp. Ca. 370 ;

Copeland v. Stephens, 1 Barn. & Ald.

593 ; and see *Carter v. Warne*, 1 Mood. & Malk. 479 ; 4 Carr. & Pay. 191 ; see *Lawrence v. Knowles*, 7 Scott, 381.

(*p*) *Hastings v. Wilson*, Holt's Ca. 290.

(*q*) 6 Geo. 4, c. 16, s. 75. See *ex parte Pomeroy*, 1 Rose, 57 ; *ex parte Nixon*, 1 Rose, 445.

lessor is enabled in a summary way to compel the assignees to make their election either to accept the same or deliver up the lease and possession of the estate ; and a provision for the same purposes is contained in the late act regarding insolvents (*r*).

26. If a bankrupt's estate be sold and the purchaser pay a deposit, and then the fiat be superseded, the Court will upon petition order the deposit to be returned, without driving the purchaser to file a bill (*s*).

*27. The biddings for an estate sold under a fiat in bankruptcy have lately been opened in analogy to the rule upon sales by courts of equity (*t*). This is much to be lamented. Lord Manners refused to open such a sale unless there was fraud or mismanagement (*u*).

28. A power in a mortgage deed to the mortgagee to sell is in the nature of a trust, but it may be exercised without the concurrence of the mortgagor (*v*) (1).

29. But where, as is usual, it is to sell in the event of default being made in payment of the installments, the declaration of the mortgagee, an interested party, is not, as against a purchaser, sufficient evidence that the event has happened on which the right of exercising the power of sale was to arise (*x*).

30. And where there was an equitable mortgage, with a power of sale, although the mortgagee was precluded from selling the estate for a stipulated period, yet the mortgagor having become bankrupt within that period, the Court of Review made an order for an immediate sale, upon the petition of the mortgagee against the wish of the assignees (*y*).

31. Trustees, assignees of bankrupts (*z*), and mortgagees with a power of sale, are of course liable to make a good title, just as if they were *sui juris*, although they are not bound to enter into covenants for the title (*a*) (2) ; and if they do not deliver the deeds to the purchaser, they are liable in the same way to furnish attested copies of the deeds, and a covenant to produce the deeds (*b*).

(*r*) 1 & 2 Vict. c. 110, s. 50.

(*s*) *Ex parte* Pector, Buck, 428.

(*t*) *Ex parte* Hutchinson, 2 Mont. & Arr. 727 ; see *ex parte* Partington, 1 Ball. & Beat. 209.

(*u*) *In re* Martin & Ormsby, 2 Moll. 446.

(*v*) *Post*, ch. 10.

(*x*) *Hobson v. Bell*, 9 Sim. 17.

(*y*) *Ex parte* Sam. Bignold, 3 Mont. & Arr. 477 ; *sed qu.*

(*z*) See *post*, ch. 10.

(*a*) *Post*, ch. 13.

(*b*) *Vide infra*, ch. 9.

(1) See *Kinsley v. Ames*, 2 Metcalf, 29.

(2) See *Post* 63 note. The law never compels a trustee, who sells under his trust, to enter into any covenants in his deed, except a covenant against his own incumbrances. But it is his duty to procure a good title to be made before he can exact the purchase money, when at the sale he has declared that a good title should be made. *Ennis v. Leach*, 1 Iredell Eq. 416.

32. And a purchaser from trustees is entitled to a compensation for a misdescription of the quantity, &c., although made without fraud, as in the case of a sale by an owner (c).

33. Trustees, assignees, mortgagees with powers of sale, cannot sell to themselves (d): they may of course vest the estate by conveyance in themselves as purchasers; even executors, having a power of sale, may sell and appoint the estate to themselves, or any of them, or appoint it to a nominal purchaser, as a trustee for them (e); but equity would not allow such a purchase to stand, unless it should prove beneficial to the *cestui que trusts* (f).

34. Where an equitable owner has conveyed the estate to trustees *to sell, the person in whom the legal estate is outstanding is bound to convey it to the trustees for sale, and is not entitled to require the concurrence of the *cestui que trusts* of the money to be produced by sale. But if, in parting with the legal estate, he goes beyond the mere purpose of conveying it to the equitable trustees, and so deals with it as to facilitate a breach of trust by the trustees, and a breach of trust be in consequence committed, he is deemed a party to such breach of trust, and is responsible for it (g).

35. Although a tenant for life of money to be produced by the sale of an estate may not, by the expressions of a will, be entitled to any interest until a sale and investment of the produce, yet where the sale is directed to be made with all convenient speed, twelve months are considered as the time within which the sale might reasonably have been made, and from that time the tenant for life is entitled to the rents of the estate remaining unsold (h).

36. In regard to trustees having the usual power of sale and exchange under a settlement, they must act in the execution of the power, when they determine to exercise it, as if it were a trust. They should ascertain, before they proceed to a sale, that their power is not a conditional one (i); and they should not *sell* under a power to make partition, or to exchange, although this may be accomplished indirectly (k).

37. Trustees of such a power, acting *bona fide*, cannot be controlled by equity in the exercise of their discretion, and a proper contract for sale by them will be enforced in equity (l); neither

(c) Hill v. Buckley, 17 Ves. jun. 394.

(d) Ch. 19, *post*.

(e) Mackintosh v. Barber, 1 Bing. 50.

(f) 1 Sugd. Pow. 142, 143.

(g) Angier v. Stannard, 3 Myl. & Kee. 566.

(h) Vickers v. Scott, 3 Myl. & Kee. 500; see Sitwell v. Bernard, 6 Ves. jun. 520, and many later cases.

(i) See 2 Sugd. on Pow. 473.

(k) *Ib.* 479.

(l) See 2 Sugd. on Pow. 486.

can they be compelled to adopt a contract for sale by the tenant for life (*m*). They should not, under the usual power, which provides for a reinvestment, sell the estate for the mere purpose of converting it into money (*n*); and if they sell the estate they must sell the standing timber with it, although the tenant for life is unimpeachable of waste (*o*). They may sell the estate to the tenant for life himself, even where his consent is required to the sale (*p*).

38. If the tenant for life sell with the approbation of the trustees, and invest the money in the purchase of another estate in his own name, they will have a lien on the new estate for the amount of the purchase-money of the old one (*q*).

39. The contract of the trustees to sell under a power of sale binds the estate; and though by the deaths of parties the power *should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (*r*) (1).

40. And I may here observe, that trustees will be answerable for costs in a suit if the decision be against them, just as if they were selling their own property, as between them and the vendor (*s*); although, if they acted properly, they may be able to charge those costs against the trust property. But although often asked, the Court seldom, in a suit between the trustees and a purchaser, directs them to have their costs over out of the trust estate, but leaves them to settle that question with their *cestui que trusts*.

(*m*) Thomas v. Dering, 1 Kee. 729.

(*n*) 2 Sugd. on Pow. 437.

(*o*) Ib. 488.

(*p*) Ib. 492.

(*q*) Price v. Blakemore, 6 Beav. 507.

(*r*) Mortlock v. Butler, 10 Ves. jun.

292; and see Shannon v. Bradstreet, 1 Scho. & Lef. 52.

(*s*) Edwards v. Harvey, Coop. 40; see

post, ch. 16, s. 2.

(1) But if an executor, in selling real estate, enter into covenants, though expressed to be in his representative capacity, respecting the title to the estate conveyed, or for the validity of the conveyance, such covenants will be deemed personal covenants, upon which the estate of the deceased will not be bound, but the executor will be liable *de bonis propriis*. Sumner v. Williams, 8 Mass. 162.

*CHAPTER II.

OF SALES UNDER THE AUTHORITY OF THE
COURTS OF EQUITY.

SECTION I.

OF THE PROCEEDINGS FROM THE ADVERTISEMENTS
TO THE CONVEYANCE.

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| <ol style="list-style-type: none"> 1. <i>Reserved bidding.</i> 2. <i>Particulars and advertisements.</i> 3. <i>Sales in the country.</i> 5. <i>Improper description.</i> 7. <i>Verbal declarations.</i> 8. <i>Mortgagee not to conduct sale.</i> 9. <i>How sale conducted.</i> 10. <i>Deposit.</i> 11. <i>Substitution of another as purchaser.</i> 13. <i>Re-sale at a profit.</i> 14. <i>Decree a security to purchasers.</i> 16. <i>Judgment creditors affected.</i> 17. <i>Contract not complete till confirmation.</i> 18. <i>How report is confirmed.</i> 20. <i>Loss by fire, &c. in the interim.</i> 21. <i>Proceedings where purchaser holds back.</i> 22. <i>Bidding by insane person void.</i> 23. <i>Payment of purchase-money and possession.</i> | <ol style="list-style-type: none"> 24. <i>Incumbrances, how paid off.</i> 27. <i>Possession from previous quarter-day.</i> 30. <i>Mortgagee's right when purchaser.</i> 32. <i>Purchaser's right to life annuity.</i> 33. <i>And to a life interest.</i> 34. <i>And to a colliery.</i> 35. <i>Court alone gives possession.</i> 36. <i>Preparation, &c. of conveyance.</i> 39. <i>Exceptions to report as to draft conveyance.</i> 40. <i>Equitable incumbrances.</i> 42. <i>Exceptions to report of title.</i> 43. <i>Purchaser cannot bring an action.</i> 44. <i>Costs to purchaser where title bad.</i> 45. <i>Who is to pay them.</i> 46. <i>Costs of reference of title.</i> 49. <i>Delay in making out title.</i> 51. <i>Sale contrary to order void.</i> 53. <i>Sale not within statute of frauds.</i> 55. <i>Purchaser restrained from waste.</i> |
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1. WHERE a fraud is committed on the purchaser, by puffing at the sale, it cannot be supported, any more than a sale by auction under similar circumstances (a); but the Court will, in a proper case, authorize a bidding to be reserved, and to be made one of the conditions of sale. The reservation will be left to the Master's

(a) Vide *supra*, ch. 1. s. 2.

*discretion, but if he exercise the discretion the Court accompanies the reserved bidding with many precautions (*b*).

2. Where an estate is directed to be sold before a Master, the particulars of sale are prepared by the plaintiff's solicitor: after they are allowed by the Master, the advertisement for sale must be prepared, either by the plaintiff's solicitor, or by the Master's clerk, and the signature of the Master must be obtained to authorize the insertion of the advertisements in the Gazette (*1*). There are always two advertisements (*c*); in the first, no time is appointed for the sale. About three weeks or a month after the insertion of the first advertisement, a warrant must be taken out to fix a time for the sale, and it must be served on all the parties' clerks in court. The warrant being attended, the Master, with the approbation of all parties, will fix the time; and the second advertisement, which is usually called the peremptory advertisement, stating the time, must then be prepared, and inserted in the Gazette (*d*) (*2*).

3. The estate is generally sold before the Master, but the Master is at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit (*e*) (*3*).

4. When the sale in the country is over, an affidavit, prepared by the Master's clerk, and sworn to by the person appointed (together

(*b*) *Jervoise v. Clark*, 1 Jac. & Walk. 389; *Shaw v. Simpson*, *ib.* 392, n.

(*d*) See 1 Turner's Practice by Ven. 127.

(*c*) See 2 Fowl. Prac. 305.

(*e*) General Order, 23d Nov. 1831, 75.

(1) It is not necessary that advertisements of the sale of real estate, by a sheriff or Master in Chancery, should be signed by the officer with his own proper signature. Whether the officer's name is signed to the advertisement by himself, or printed, or signed by another, is immaterial. In either case it is a virtual signing by the officer. *Coxe v. Halsted*, 1 Green Ch. 301.

(2) A reasonable notice in the sale of land under a decree of Chancery, is all that can be required, and such sale may be ordered in the discretion of the Chancellor, for cash or credit. *Darrington v. Borland*, 3 Porter, 12. Where the sale is advertised for a specified day, between the hours of *twelve and five o'clock in the afternoon*, and the property is sold in pursuance of such advertisement, the sale will not be set aside, although there is a propriety and convenience in specifying a particular hour between twelve and five o'clock for the sale. *Coxe v. Halsted*, 1 Green Ch. 311.

(3) In New York a sale of mortgaged premises under a decree must be made by the Master himself, or under his immediate direction. *Hyer v. Deaves*, 2 John. Ch. 151. A sale by a person deputed by the Master, in his absence, is irregular and will be set aside, *ib.* This decision was made under the Statute of New York, which directs "that all sales of mortgaged premises, under a decree, shall be made by a Master," *ib.*

If the sale is advertised to be on the premises, and the estate is actually sold within eighty yards of the dwelling-house and within view, it will not be set aside, although in fact it was not on the premises, but fifteen or twenty yards from the boundary line; the sale otherwise being regular and no fraud appearing. *Ferguson v. Franklin*, 6 Munf. 305.

ther with the bidding-book and printed particulars annexed), stating the sale and the biddings, and the sum for which the estate sold, and to whom, by name, is required (*f*).

5. The particulars should, as in the case of private sales, correctly state the rental and nature of tenure, &c. (1). If the property be described as held by tenants under written agreements, and the holdings are by parol, the purchaser will be allowed to retire from the contract (*g*).

6. If the rents of the estate are incorrectly represented to the purchaser's disadvantage, he will be entitled to a compensation; but if he object to the statement upon a sale, and there is a re-sale under the same representation, and instead of pointing out the error he again purchases, he cannot claim any compensation (*h*).

7. The Court, as in cases of sale by public auction, does not in general attend to verbal declarations at the sale, the babble of the auction-room, as it has been called, except in cases where they *have to consider whether a purchaser is to take his bargain or not (*i*).

8. If a mortgagee in a foreclosure suit be allowed to bid for the estate, he will not be permitted to conduct the sale (*k*); and no party to a suit can bid for an estate sold under the decree without the authority of the Court (*l*); and yet a solvent partner, a defendant in a suit by the assignees of the bankrupt partner for a sale, who bought without leave at the sale before the Master, was allowed to retain his purchase (*m*).

9. The plaintiff's solicitor should attend at the sale, which is conducted in the following manner:—The Master's clerk prepares

(*f*) 1 Newl. Pract. 540.

(*g*) *Bessonnet v. Robins*, 1 Saus. & Scul. 142.

(*h*) *Campbell v. Hay*, 2 Moll. 102.

(*i*) See 1 Jac. & Walk. 638, 639; *per* Lord Eldon.

(*k*) *Domville v. Berrington*, 2 You. & Coll. 723; *Drought v. Jones*, 1 Fla. & Kel. 316.

(*l*) *Elworthy v. Billing*, 10 Sim. 98.

(*m*) *Wilson v. Greenwood*, 10 Sim. 101, n.

(1) The Master must not, in his description of the property, add any particulars which may unduly enhance the value thereof, or mislead the purchaser. *Veeder v. Fonda*, 3 Paige, 97. See *Post v. Leet*, 8 Paige, 337; *Seaman v. Hicks*, 8 Paige, 656.

The sale by an officer will not be set aside because the terms of sale are unusually strict or severe, if the circumstances of the case call for rigid measures, and no design is manifested to oppress or injure the parties interested. *Coxe v. Halsted*, 1 Green Ch. 311. But if the officer's conduct is grossly improper and oppressive, upon a sale by him, it seems he will be ordered to pay the costs of setting aside his report of sale, and of the subsequent proceedings therein. *Baring v. Moore*, 5 Paige, 48.

a particular of the lots to be sold, with spaces between each lot (1). The lots are successively put up at a price offered by any person present, and every bidder must sign his name and the sum he offers, in the space on the particular, under the lot for which he bids; and formerly 2s. 6d. was paid to the Master's clerk for every bidding; but that regulation, which had a tendency to damp the sale, was abolished, and in lieu of the half-crowns a sum was allowed to the clerk, as part of the expenses attending the sale. And this again has been corrected under the authority of the 3 & 4 Will. 4, c. 94, and "upon every sale by the Master, where the purchase-money does not exceed 2,000*l.*, payable on the report confirmed absolute, there is payable by such party as the Master shall direct, 5*l.*; and for every sale above 2,000*l.*, on every 100*l.*, 5s. It has been decided that when the whole produce of the sale does not exceed 2,000*l.*, however numerous the lots or purchasers, only 5*l.* is payable, and 5s. on every 100*l.* beyond that sum (*n*).

The best bidder is of course declared the purchaser. If any lots are not sold, they must be again advertised for sale (*o*).

10. The payment of a deposit, and the investment of it in the funds, are governed by the same rules as are adhered to where the contract is between party and party: and therefore a purchaser is not entitled to the benefit of a rise in the funds when his purchase is completed (*p*).

11. The Court will, on motion, discharge the purchaser, and substitute any other person in his stead; but this will not be done *unless such person pay in the money, and an affidavit be made that there is no under-bargain; for the new purchaser may give the other a sum of money to stand in his place, and so deceive the Court (*q*). Formerly the practice seems to have been to require

(*n*) In the matter of Allen's Charities, 2 Myl. & Kee. 627; Windsor v. Tyrrell, ib. 628, n.

(*o*) See 1 Turn. Pract. 129; 2 Fowl. Prac. 306, 307.

(*p*) Vide *supra*, p. 51; Ambrose v.

Ambrose, 1 Cox, 194; D'Oyley v. Countess of Powis, ib. 206.

(*q*) Rigby v. M'Namara, 6 Ves. jun. 515; Vale v. Davenport, 6 Ves. jun. 615; see Hamilton v. Ball, 2 Ir. Eq. Rep. 195; Vincent v. Going, 1 Fla. & Kel. 428.

(1) It is the duty of the officer, to sell property plainly divided, in separate parcels; Penn v. Craig, 1 Green Ch. 495; if the property is so situated that it will probably produce more by that mode of selling; or where a part only is required to be sold. Mohawk Bank v. Atwater, 2 Paige, 54. But the sale of several parcels together does not render the sale void, but only voidable; and after a great lapse of time, the sale will not be disturbed. Mohawk Bank v. Atwater, 2 Paige, 54; Penn v. Craig, 1 Green Ch. 495.

the consent of all the parties in the cause, as well as the consent of the original purchaser (*r*).

12. But even where the title is defective, and another person has agreed to take the estate with the defective title, yet no order can be made until the first purchaser is discharged (*s*); and it must be by arrangement, for the Court will not offer to sell with a title which it is aware is bad (*t*); nor will it provide by condition against imaginary defects (*u*).

13. If the purchaser resell at a profit behind the back of the Court, before his purchase is confirmed, the second purchaser is considered a substituted purchaser, and must pay the additional price into Court for the benefit of the estate (*x*) (1).

14. Although more of an estate is sold than is necessary for the purposes of the trust by virtue of which the decree was made, yet the purchaser can make no objection to it, the decree being a sufficient security to him, as it cannot appear but that it was right to sell the whole. If, however, the decree were, that the Master should sell Greenacre, and he sells Blackacre, an objection to the sale would be good (*y*); although it seems that it may be laid down as a general rule, that a purchaser shall not lose the benefit of his purchase by any irregularity of the proceedings in a cause (*z*). If a decree is obtained by fraud, it may, of course, be relieved against (*a*); and it has been said that a purchaser is bound to see, that, at least as far as appears on the face of the proceedings before the Court, there is no fraud in the case (*b*); but, if the Court itself be imposed upon, it would be a strong measure to *imply* notice of the fraud to the purchaser, from the very proceedings before the Court. But it is a settled maxim that persons purchasing *under decrees of the Court are bound to see that the sale is made according to the decree (*c*). And this more especially applies to the plaintiff in the cause (*d*). Of course a purchaser

(*r*) *Matthews v. Stubbs*, 2 Bro. C. C. 291.

(*s*) *Williams v. Wace*, C. Coop. 12.

(*t*) *Piers v. Piers*, 1 Saus. & Seal. 414; see *Lahey v. Bell*, 6 Ir. Eq. Rep. 122.

(*u*) *Bennett v. Wheeler*, 1 Ir. Eq. Rep. 18.

(*x*) *Nodder v. Ruffin*, 1 Taunt. 311.

(*y*) *Lutwych v. Winford*, 2 Bro. C. C. 248.

(*z*) *Lloyd v. Jones*, 9 Ves. jun. 37; *Curtis v. Price*, 12 Ves. jun. 89; *Bennett v. Harnell*, 2 Scho. & Lef. 566; *Burke v.*

Crosbie, 1 Ball & Beat. 489; *Lighthorne v. Swift*, 2 Ball & Beat. 207; see *Baker v. Morgan*, 2 Dow, 526; *Mullins v. Townsend*, 1 Dow & Clark, 430.

(*a*) *Kennedy v. Daly*, 1 Scho. & Lef. 355; *Giffard v. Hort*, *ib.*; *Lansdowne v. Beauman*, 1 Moll. 89.

(*b*) *Gore v. Stapoole*, 1 Dow, 30; as to the time of sale, see *Blacklow v. Laws*, 2 Hare, 40.

(*c*) *Coldough v. Sterum*, 3 Bligh, 181.

(*d*) *Talbot v. Minnet*, 6 Ir. Eq. Rep. 83.

(1) See *Proctor v. Farnam*, 5 Paige, 614.

making use of the machinery of the Court to obtain the estate fraudulently as against the persons entitled to the inheritance, although with the concurrence of the tenant for life, cannot sustain his purchase (*e*). And the tenant for life cannot be permitted in such a sale to obtain a benefit at the expense of the remainderman, and if the purchaser permit him to do so, that may in some cases vitiate the sale, although the Court, if the transaction was not fraudulent, will struggle to correct the misapplication, and not to rescind the sale (*f*).

15. In the much contested Scotch case of *Vans Agnew v. Stewart* (*g*); where a private Act of Parliament authorized the Court of Session, upon an action instituted, to inquire into and ascertain the extent and amount of the debts of a deceased tenant in tail, and chargeable upon the entailed estate, and after having fixed and ascertained the amount of such debts, to sell the estate; the object of the suit was to set aside the sales made of the estates, because the provisions of the Act had not been followed. Lord Eldon observed that the case of these purchasers was extremely distressing, and he wished to lay it down in language as clear as any in which he could express himself, that if a Court in this part of the island, or in Scotland, is authorized by an Act of Parliament to proceed to a sale, and if in the manner in which the Act of Parliament provides they shall so proceed, no purchaser is answerable, or can be answerable, for the mistakes or blunders of the Court. Parliament trusts to the wisdom and discretion of the Courts; and if the Courts act according to the rule of proceeding which is laid down for their government, although they may be wrong, for instance, if they were to mistake the amount of the debts, if they were to suppose that debt A. affected lands, when it did not affect lands, or that debt B. did not affect the lands, when it did affect the lands,—if purchasers, under these mistakes and blunders, were not found to be safe, he did not know how any one could deal as a purchaser under an Act of Parliament. But then he conceived that every Court was bound to proceed according to the directions of the Act; and that if the Court of Chancery was bound to proceed according to the prescribed mode, and did not so proceed, then the transactions of the Court of Chancery would be *no more a security to the purchaser, than if that Court had not

(*e*) *Thornhill v. Glover*, 3 Dru. & War. 195.

(*f*) *Bowen v. Evans*, 6 Ir. Eq. Rep. 569.

(*g*) H. of L. Cases, 1822, MS.

been authorized by law to proceed at all. And so in like manner if the Court of Session had not proceeded as the Act of Parliament directed, the consequence was, that the purchaser under that Court was in no better situation than the purchaser under any other Court not conforming to the proper course of proceeding. The whole proceedings appeared to him contrary to the powers and authorities given to the Court of Session, in order to make good titles to the purchasers. Lord Redesdale observed, that it appeared to him most clear, that the Court of Session, having no authority whatsoever to decree a sale of the estate, except that which the Act of Parliament gave them, they were bound to proceed according to the powers given them by that Act of Parliament; and that if they did not do so, they were acting without authority. You did not mean, my Lords, to speak of any error in judgment. If they had decided what were the debts with which the estates were affected, and they had improperly so decided; if they had allowed claims that were not within the intent of the Act of Parliament, he did not conceive that an error in judgment of that description would have affected the title of the purchasers. But they proceeded without any authority whatsoever; he therefore apprehended that the whole of the proceedings of the Court of Session, with respect to the sale of the estate, were void. He had thought it very important to state just so much upon the subject, as he wished it to be understood that it was not for an error in judgment on the part of the Court of Session that he thought these purchases were void. If the Court of Session had decreed in a suit properly brought, mere error in judgment would be no ground for setting them aside. If the Court of Session had proceeded in a cause in which all the proper parties were represented, and if in the end justice had been done, though the order of sale which was directed by the Act of Parliament had not been pursued, he thought that would not have been a ground for overturning the whole of that which had been done.

16. Where the Court sells, it will protect the purchaser against the parties to the suit, and all persons coming in under the decree. But a person having a legal lien, as a judgment-creditor not coming in under the decree, would not be bound by it, and might proceed against the purchaser (*h*), unless he obtained a legal interest

(*h*) *Barrett v. Blake*, 2 Ball & Beat. 351; *Johns v. French*, *ib.* 450; *Piers v. Saus. & Seul*, 379; 1 *Jura. & 2 Moli.* 301. *Walsh*, 265; *Barrett v. Burningham*, 1

over-reaching the lien ; in which case it was held by Lord Manners *that the claim being merely in equity, the Court would protect the purchaser buying under its decree (*i*), or rather would not lend its aid to the judgment-creditor against him. But this has since been denied to be law, and therefore a purchaser under a decree for sale for payment of an incumbrance should see that he obtains a discharge from all judgment-creditors, or that they are bound by the decree whether he obtains the legal or equitable estate.

17. In sales by auction or private agreement, the contract is complete when the agreement is signed ; but a different rule prevails in sales before a Master ; the purchaser is not considered as entitled to the benefit of his contract till the Master's report of the purchaser's bidding is absolutely confirmed (1) ; and I shall now proceed to show what steps a purchaser must take to obtain an absolute confirmation of the Master's report.

18. The purchaser must first, at his own expense, procure a report from the Master, of his being the best bidder for the lot he has purchased. After the report is filed, and an office-copy of it taken by the purchaser, he must, at his own expense, apply to the Court by motion, of which no notice need be given (*k*), that the purchase may be confirmed. Upon this application the order will be confirmed *nisi*, (*l*), that is unless cause be shown against the same in eight days after service. The purchaser must, at his own expense, procure an office-copy of this order from the Register (I). If no cause be shown within the eight days, the purchaser must, at his own expense, apply to the Court to confirm the report absolutely, which will be done of course (*m*), on an affidavit of the service of the order (*n*), and a certificate of no cause having been shown. The certificate is obtained from the Register by application to the entering clerk, and leaving the order *nisi*, the day before. Notice of this application need not be given (*o*). But if he be served with notice of a motion to open the biddings, he

(*i*) *Steele v. Philips*, 1 Hogan, 49 ; Beat 188.

(*k*) See *Parker's Analysis*, 141.

(*l*) For a form of the order, see 2 Fowl. Pract. 308.

(*m*) For a form of the order, see 2 Fowl. Pract. 311.

(*n*) For forms of the affidavit, see 2 Turn. Pract. 503, 522 ; *Parker's Anal.* 98 ; 2 Fowl. Pract. 310.

(*o*) See 1 Turn. Pract. 129.

(I) See 3 & 4 Will. 4, c. 94, s. 10, which authorizes any person to take an office-copy of so much only of any decree, order, report, or exceptions, as he may require.

(1) See *Monell v. Lawrence*, 12 John. 521.

cannot regularly proceed to confirm his report absolutely (*p*). The order, however, to confirm absolutely the report when served operates from the day on which it was pronounced (*q*).

*19. If after having obtained the order *nisi*, the purchaser neglects to confirm the order, the vendor himself may make the motion (*r*).

20. The bidder not being considered as the purchaser until the report is confirmed, is not liable to any loss by fire or otherwise which may happen to the estate in the interim (*s*); nor is he, until the confirmation of the report, compellable to complete his purchase (*t*); but upon the report being confirmed, he will be compelled to carry the contract into execution (*u*). And if an interest of uncertain duration be purchased—as a life interest, the purchaser will be bound, although the life drop the same night (*x*).

21. If the purchaser neglect to complete his purchase, the practice is for the sellers to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to inquire whether the party can make out a good title (*y*) (1), and if he can,

(*p*) *Vansittart v. Collier*, 2 Sim. & Stu. 608.

(*q*) *Aberdeen v. Watlin*, 6 Sim. 146.

(*r*) *Chillingworth v. Chillingworth*, 1 Sim. & Stu. 291; *Lidbetter v. Smith*, 5 Beav. 377.

(*s*) *Ex parte Minor*, 11 Ves. jun. 559; see 13 Ves. jun. 518; 1 Jac. & Walk. 630.

(*t*) *Anon.* 2 Ves. jun. 335.

(*u*) *Barker v. Holford*, and *Eggington*

v. Flavel, 2 Anstr. 344, cited.

(*x*) *Anson v. Towgood*, 1 Jac. & Walk. 637; see *Vincent v. Going*, 1 Plan. & Kel. 250, reversed upon appeal. See 3 Ir. Eq. Rep. 180; *Vesey v. Elwood*, 1 Plan. & Kel. 667; 3 Dru. & War. 74.

(*y*) Notice must be given of the motion for this order. For a form of the notice, see 2 Turner, 650.

(1) *Gordon v. Lines*, 2 McCord Ch. 167. But such an inquiry is not indispensable; it is merely for the benefit of the purchaser, that he may not be compelled to take a defective title. But if the purchaser is satisfied, and makes no objection to the title, or waives the inquiry, it does not afterwards lie in in his mouth to take any exception of this nature. And, *a fortiori*, his surety has no right to take any such exception; for he has nothing to do with the matter of the title. This is an affair wholly appertaining to the rights and duties of the principal. *Wood v. Mann*, 3 Sumner C. C. 318, 332.

When, however, the purchaser at the Master's sale, purchases under the assurance that he is to receive a perfect title, if such title cannot be given, he will not be compelled to complete the purchase. *Morris v. Mowatt*, 2 Paige, 586. A purchaser has a right to require, under such circumstances, a title, which is good both at law and in equity, *ibid.* See *Seaman v. Hicks*, 8 Paige, 656.

In Maryland, the rule of *caveat emptor* applies to all judicial sales. Chancery in no case attempts to sell any thing more than the title of the parties to the suit; and it allows of no inquiry into the title at the instance of the purchaser or any one else. *Brown v. Wallace*, 4 Gill & John. 479; *Anderson v. Foulke*, 2 Harr. & Gill, 346. See *Atkinson v. Farmer*, 2 Murphey, 291.

In *Spring v. Sandford*, 7 Paige, 556, it was held that where real estate is sold by a Master under a decree of a Court of Chancery, as and for a good title, the purchaser is only entitled to such a title as a purchaser of the premises at a private sale would be bound to receive from his vendor. See *Jackson v. Edwards*, 7 Paige, 388; S. C. 22 Wendell, 498; matter of *Browning*, 2 Paige, 64; *Dunham v. Minard*, 4 Paige, 441; *Weems v. Brewer*, 2 Harr. & Gill, 390.

to obtain an order upon the purchaser to complete his purchase (z) (I) ; but if the purchaser is unable to complete his purchase, then on the report being confirmed, it is moved to discharge him from the bidding (a), and notice of this motion must be given to the purchaser (b). But a purchaser will not be permitted to baffle the Court ; and therefore, instead of discharging the purchaser from his bidding, the Court will, if required, make an order that he shall, within a given time, pay the money, or *stand committed (c) (1). The order generally would be to resell, throwing the expense and loss upon the first purchaser, but not discharging him from the purchase by the order (d) (2).

22. If an insane person bid, of course the estate must be resold ; but the Court has no power to hold the next bidder to his bidding

(z) See 2 Fowl. Pract. 318, 325.

(c) *Lansdown v. Elderton*, 11 Ves. jun.

(a) *Cunningham v. Williams*, 2 Anstr. 341.

512 ; see *Gray v. Gray*, 1 Beav. 199.

(b) For a form of the notice, see 2 Turn. 511.

(d) *Harding v. Harding*, 4 Myl. & Cra.

Pract. 651.

(1) A motion was made before Lord Erskine, that the purchase-money should be paid in by the purchaser. The purchaser did not appear. After consulting the Register, who had searched for precedents, and expressing his unwillingness to do anything to prejudice sales by the Court, the Chancellor refused the motion, but ordered the title to be referred to the Master ; and then, he said, if a good title could be made, he would compel payment of the money according to the usual practice.—Anon. Ch. 22d July 1803, MS. In 1 Newl. Pract. 511, it is said, that it seems that if the report is confirmed by the *cendors* it is not necessary, previous to the application against the purchaser, that he be ordered to pay in his purchase money, that an abstract of title should be delivered to him. *Sanders v. Guy*, Jan. 1811, before Lord Eldon. See 1 Beav. 200, by the name of *Gray v. Gray*.

(1) *Richardson v. Jones*, 3 Gill & John. 161 ; *Wood v. Mann*, 3 Sumner C. C. 318. And in a case where the purchaser at a sale by the Master, in conformity with a decretal order of the court, gave security to the Master, in the shape of a covenant, with a surety, to pay the purchase-money within a given time, and the money was not paid either by the principal or surety within that time, it was held, that a court of equity might, by attachment, not only compel the purchaser to complete his purchase by paying in the purchase-money, but might also proceed against the surety, who had thus made himself a party to the proceedings, in the same summary manner. *Wood v. Mann*, 3 Sumner C. C. 318.

(2) 3 Dan. Ch. Pr. (Perkins's ed.) 1461, 1162 ; *Simmons v. Tongue*, 3 Bland, 341 ; *Mullikin v. Mullikin*, 1 Bland, 511. Where there is a decretal order, that in case of non-payment of the purchase-money within a given time, there shall be a resale by the Master, this is regarded as a mere auxiliary security belonging to the party seeking the benefit of the sale. But the court is at liberty to rescind or suspend such order at any time. The right to re-sell does not take from the purchaser the right to proceed by attachment. *Wood v. Mann*, 3 Sumner C. C. 318 ; *Seaton v. Slade*, 7 Vesey, 265, 276.

So in another case where by the conditions of sale, it was provided that, "if the purchaser did not comply with the conditions, the property should be resold," the officer was held not bound upon a failure of the purchaser to comply with the conditions, to make a second sale, though requested to do so by the defendant in the execution. *Woodhull v. Neafie*, 1 Green Ch. 409. See *Thompson v. Dimond*, 3 Edw. 295 ; *Hewlett v. Davies*, 3 Edw. 338.

and the Court has refused in such a case to allow the next bidder to stand as the purchaser, notwithstanding all the parties in the cause desired it, as they apprehended the estate would not sell for so much to any other person. The estate was ordered to be resold generally (*e*).

23. When the report is absolutely confirmed, the purchaser is entitled to a conveyance on payment of the purchase-money, and may, after giving notice of his intention (*f*), apply to the Court for leave to pay his purchase-money into the Bank (*g*), and to be let into possession of the estate; but this application should of course not be made until the title be approved of (*h*). When the money is paid according to the order, the purchaser must, at his own expense, obtain a certificate of the payment of it (*i*).

24. If the estate be subject to an incumbrance which appears upon the report, the purchaser should, after giving notice of his intention (*i*), apply to the Court for leave to pay off the charge, and to pay the residue of the purchase-money into the Bank. But where an incumbrance on the estate does not appear on the report, and any of the parties refuse, or are incompetent to consent, a purchaser cannot apply any part of his purchase-money in discharge of the incumbrance, though perhaps, if the parties be all competent to consent, and do consent, it may be done (*k*).

25. Where two or more persons purchase one lot, the money must be paid altogether; the Court will not allow them to pay their proportions separately, on account of the confusion which might ensue (*l*).

26. In the Exchequer, purchase-money is allowed to be paid in without prejudice to any objections which the purchaser may be advised to make upon subsequent investigation (*m*). And this is sometimes allowed in the Court of Chancery upon special application, but it is a practice not to be encouraged, and a purchaser will not be allowed to pay in his purchase-money and to take possession of the property unless he accepts the title (*n*).

(*e*) *Blackbeard v. Lindrigen*, 1 Cox. 205.

(*f*) For forms of the notice, see 2 Turn. Pr. 647; *Park. Anal.* 140.

(*g*) For the mode of paying the money into the Bank, see 1 Turn. Pract. 210; and for a form of the order, see 2 Fowl. Pract. 313.

(*h*) See 2 Fowl. Pract. 317.

(*i*) For a form of such notice, see 2

Turn. Pract. 648.

(*k*) — *v. Stretton*, 1 Ves. jun. 266.

(*l*) *Darkin v. Marye*, 1 Anst. 22.

(*m*) *Marfil v. Rudge*, 2 You. & Coll. 566.

(*n*) *Hutton v. Mansell*, 2 Beav. 260.

(1) But a purchaser of a Chancery sale is not answerable for any disposition which the Court may make of the purchase-money. *Brown v. Wallace*, 4 Gill & John. 479.

27. A purchaser under a decree is entitled to be let into possession of the estate from the quarter-day preceding his purchase, paying his money before the following one (*o*) ; which proposition has no relation to the time of his being declared by the master to be the highest bidder, but to the confirmation of the report (*p*), for until then he is not the purchaser (*1*).

28. Where a purchaser allows the time to elapse, he is entitled to the rent only from the quarter-day preceding the payment of the money into Court (*2*). This is the settled practice here, although it led to a difference of opinion in Ireland before it was settled there (*q*).

29. And a purchaser is not entitled to the rents for a period beyond the quarter-day preceding the payment of his money, merely because he has been ready to complete his purchase, and had his money ready lying dead in a banker's hands ; for he might have moved to pay the money into Court, when it would have been laid out ; and this, if done by special application, would not have been an acceptance of the title (*r*).

30. When a mortgagee purchases, and his principal and interest, calculated up to the last quarter day, exceed the purchase-money, he will be let into possession as from the *preceding* quarter-day (*s*).

31. But a purchaser will not be allowed profits not really belonging to the quarter ; for example, a purchaser of a manor must pay to the vendor the fines payable on account of deaths of copyholders *before* the quarter, although the admissions do not take effect until after he is let into possession, for such fines will be considered as having accrued before the period from which the purchaser is entitled (*t*).

32. A life annuity stands upon a different footing, and a purchaser will be entitled to it from the time he could have confirmed the report absolutely, and pays interest from that day (*u*).

33. And where a life interest was sold in three per cent. consols, and reduced, and the day after the sale half a year's dividends on

(*o*) *Twigg v. Fifield*, 13 Ves. jun. 517 ; see *Garrick v. Earl Camden*, 2 Cox, 231 ; *v. Dakens*, C. Coop. 381. vide *post*, ch. 16.

(*p*) See 1 Rep. t. Plunk. 176, 177. (*r*) *Barker v. Harper*, Coop. 32 ; *Hindle v. Dakens*, C. Coop. 381.
(*q*) See *Gowan v. Tighe* ; *Prendergast v. Eyre*, 1 Rep. t. Plunk. 168, 180. (*s*) *Bates v. Bonner*, 1 Sim. 427.
(*t*) *Garrick v. Lord Camden*, 2 Cox, 231. (*u*) *Twigg v. Fifield*, 13 Ves. jun. 517.

(1) Immediate possession will not be ordered where it will be attended with the loss of the then growing crops. *Chapline v. Chapline*, 1 Bland, 364 ; *Wright v. Wright*, 1 Bland, 365 ; *Taylor v. Colegate*, 1 Bland, 365 ; *Dorsey v. Campbell*, 1 Bland, 365.

(2) In *Wood v. Mann*, 3 Sumner C. C. 318, the rents and profits were allowed to the purchaser only from the time of the completion of the conveyance.

the consols became due, and the purchase was confirmed, and the money paid before the end of the month, the purchaser was held to be entitled to the half year's dividend. Lord Eldon observed *that the rule of the Court in the purchase of a fee simple estate was to give the profits from the quarter-day preceding the payment of the purchase-money ; but was that so, he asked when a man buys a life estate which may not last five minutes ? It would be difficult to state any difference between the dividends on the consols which became due the next day, and those on the reduced, which were not payable till three months after. Could anything turn upon the report not being confirmed ? There was a case about a house being burnt down before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid ? The report, he thought, when confirmed, must have relation back to the purchase ; and the contract was made the moment that the purchaser's name was entered in the Master's book. If the tenant for life (I) had lived till the day after the sale and then died, the purchaser would have had nothing if he was not entitled to these dividends (v).

34. Nor does the general rule apply to a colliery, which is considered as a trade. The profits are settled monthly, and therefore the purchaser is entitled to the profits only from the commencement of the month in which he purchased, paying his purchase-money in the course of that month (y).

35. If a purchaser enter into possession, he will be compelled to pay the money into Court, although he entered with the permission of the parties in the cause. The Court only can give such permission (z).

36. When the report is absolutely confirmed, and every thing arranged, the draft of the conveyance must be drawn by the purchaser's solicitor, and either settled by the Master, if the parties insist upon it, or, which is more customary, by a conveyancing counsel of whom the Master approves. The Master's clerk will, at the purchaser's expense, ingross the deed, procure the report or certificate of its being allowed, and then deliver the deeds to the

(x) *Anson v. Towgood*, 1 Jac. & Walk. 637 ; see *Vincent v. Goring*, 1 Flin. & Kel. 259 ; 3 Ir. Eq. Rep. 489 ; *Vesey v. Eldwood*, 1 Flin. & Kel. 667 ; 3 Dru. & War. 75.

(y) *Wren v. Kirton*, 8 Ves. jun. 502 ; *Williams v. Attenborough*, Turn. & Russ. 70.

(z) *Anon.* L. L. Hall, 16 July 1816, MS.

(I) In the report it is *the purchaser*, because the purchaser was himself the tenant for life, whose interest was sold.

purchasers ; and it is usual to obtain the Master's signature to every skin. The report must be filed (*a*).

37. It is usual, however, to so word decrees, that the draft shall *not go before the Master *unless the parties differ*. Where this mode is adopted, the business is transacted in the same way as upon a sale by private contract, unless the parties cannot agree, in which case, resort is had to the Master.

38. When the deeds have been properly executed by all necessary parties, an affidavit of the due execution of them must be made, and filed in the affidavit office, and an office-copy of the affidavit must be taken ; this being done, the money directed to be paid in consequence thereof, may be procured in the usual manner (*b*). When all proper parties have been directed to convey, and a party to the cause withholds his concurrence, the motion that he do convey should be made against him personally (*c*).

39. If the parties disagree as to the necessary parties, &c. to the conveyance, the Master will report his approbation of the draft, as settled by him. To this report exceptions may be taken (*d*), and then the question will come before the Court in a regular way.

40. It has been held that the purchaser obtaining the legal estate cannot require, at the seller's expense, a release from equitable incumbrances whose demands have been satisfied by the Court (*e*).

41. Where a Master is directed to settle a conveyance in case the parties differ about the same, the party entitled to prepare the conveyance is to bring in the draft of the conveyance into the Master's office and give notice of his having so done to the other party ; and at any time within eight days after such notice, such other party will have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit, and at or before the expiration of the eight days, or such further time as the Master shall in his discretion allow, he must then either agree to adopt the conveyance or signify his dissent therefrom, and will thereupon be at liberty to deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he deliver no such statement in writing, or if the other party refuses to adopt the pro-

(*a*) 1 Turn. Pract. 145.

(*b*) 1 Turn. Pract. 145.

(*c*) Stillwell v. Mellersh, 4 Myl. & Cra. 581.

(*d*) Lloyd v. Griffith, 1 Dick. 103 ;

Tipping v. Gartside, 2 Fowl. Pract. 328 ;
Wakeman v. Duchess of Rutland, 3 Ves.
jun. 504.

(*e*) Keatinge v. Keatinge, 6 Ir. Eq.
Rep. 43 ; Webber v. Jones, *ib.* 142.

posed alterations in the draft of the conveyance, the Master is then to proceed to settle the conveyance according to the practice of the Court. And in case the Master shall adopt the proposed alterations in the draft, the costs of the proceeding with respect to the conveyance are borne by the other party (*f*).

*42. So if the parties differ as to the validity of the title to the estate, the Master must make his report upon the title, to which exceptions may in like manner be taken (*g*).

43. A purchaser must apply to the Court for the relief to which he is entitled, and will not, for example, be permitted to bring an action for any document of title, the possession of which he claims (*h*).

44. If the title prove bad, the purchaser will be paid out of the funds in the cause, the costs of the orders for confirming him as purchaser, of the reference, and of the application, and the expense of investigating the title. The order in such a case is for payment out of the fund, of the purchaser's costs of, and consequent upon his having become purchaser, and also of the application, and his reasonable charges and expenses of investigating the title (*i*).

45. If there are no funds in Court, the plaintiff will in a common case be ordered to pay the purchaser in the first instance (*k*) his costs, charges and expenses incurred in the investigation of the title, together with the costs of the application; and this, although the plaintiff be only a legatee; but he will be at liberty to recover them over in the suit (*l*).

46. In every case the purchaser is entitled to the costs of the motion for a reference of title, and to the costs of that reference (*m*). Where the title proves good, the purchaser bears his own costs of the investigation.

47. But if a purchaser is relieved from the purchase upon a collateral ground which he ultimately takes, of course he will not be allowed his costs of investigating the title (*n*).

48. In a case before Lord Hardwicke (*o*), where a man having bought an estate before the Master, filed a bill against the heirs at law of a devisor under whom the title was made, and also against the persons who were to convey the property, in order to have the

(*f*) General Order, 23d Nov. 1831, 76.

(*g*) For forms of exceptions, see 2 Turn. Pract. 589.

(*h*) Stubbs v. Sargon, 4 Beav. 80.

(*i*) Reynolds v. Blake, 2 Sim. & Stu.

117; Attorney General v. Corporation of Newark, 8 Sim. 74.

(*k*) Smith v. Nelson, 2 Sim. & Stu. 557.

(*l*) Berry v. Johnson, 2 You. & Coll.

564.

(*m*) Camden v. Benson, 1 Kee. 671; see Fielder v. Higginson, 3 Vcs. & Bea. 142; Reynolds v. Blake, 2 Sim. & Stu. 117.

(*n*) Magennis v. Fallon, 2 Moll. 592.

(*o*) Mackrell v. Hunt, 2 Madd. 34, n.

conveyance made, and to establish the will, and perpetuate the testimony, and the bill was dismissed (but without prejudice to the evidence for perpetuating the testimony) with costs as to the heirs at law, who examined no witnesses, but contested the will by their answer, and without costs as to the other parties, the purchaser was allowed so much of the costs of the suit as related to the perpetuating the testimony of the execution of the will, and the costs paid to the heirs at law, although Lord Hardwicke did *not think it was absolutely necessary to perpetuate the testimony.

The purchaser, it will be observed, was not allowed the costs of the suit so far as it sought a conveyance to him, which he could have obtained without suit, and clearly the other costs would not now be allowed to a purchaser, for he is not at liberty to file a bill against adverse parties in order to clear up the title before a conveyance, much less to throw the costs of such a suit upon the estate.

49. In a case where there was error in the decree under which the estate was sold, the purchaser was discharged, upon motion, from his purchase, although the parties were proceeding to rectify it (*p*). Lord Eldon said, that he would not extend the rule which the Court had adopted, of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it had not already been applied, but as to costs, Lord Eldon observed, that the rule in general was that the suitor must pay for the mistakes of the Court. It was true the purchaser was not a party to the suit, but still the other parties had been misled by the Court; they had been acting on its judgment, and it required consideration whether they should be made to pay the costs. The purchaser waived the costs, but he ought, it should seem, to have been allowed them.

50. If a purchaser of an estate under a decree of the Court, after the absolute confirmation of the report, and before any conveyance made to him, die, having devised his interest therein, the Court will order a conveyance to be made to the devisees, without the consent of the testator's heir at law where he is an infant (*q*).

51. If an estate directed to be sold before a Master, is sold by private contract, or in any other manner contrary to the order of

(*p*) *Lechmere v. Brasier*, 2 Jac. & Rep. 602; *Calvert v. Godfrey*, 6 Beav. Walk. 287; see *Chamberlain v. Lee*, 10 97.
 Sim. 444; *Plumtre v. O'Dell*, 4 Ir. Eq. (*q*) *The King v. Gregory*, 4 Price, 380.

the Court, and not actually conveyed to the purchaser, the Court will not take notice of the sale, but will direct the estate to be sold before the Master according to the decree (*r*). And a person who has notice of the decree cannot be advised to purchase the estate unless it be sold before the Master (*s*) : and the money should be paid into court, and not to the party (*t*).

52. If an estate be sold contrary to the order of the Court, and the purchaser had notice of the decree, he will have no remedy ; *but if he bought without notice, he may recover at law for breach of the agreement (*u*).

53. A sale before a Master is not within the statute of frauds, and after confirmation of the Master's report of the best purchaser, the sale will be carried into effect even against the representative of the purchaser, although he did not subscribe ; the judgment of the Court taking it out of the statute (*x*).

54. And even if the authority of an agent not being admitted cannot be proved, yet if the Master's report could be confirmed, the sale would be carried into execution unless some fraud were proved (*y*).

55. As a purchaser under a decree does by the act of purchase submit himself to the jurisdiction of the Court, he may, if he obtain possession of the estate before the contract is completed, be restrained by injunction from committing waste (*z*) (1).

(*r*) *Annesley v. Ashurst*, 3 P. Wms. 282. See and consider *ex parte Hughes*, 6 Ves. jun. 617.

(*s*) See 3 vol. Ca. and Opin. 224, 225.

(*t*) See 2 Scho. & Lef. 581 ; see *Price v. North*, 2 You. & Coll. 627, which *qu.* 381.

(*u*) *Raymond v. Webb*, Lofft. 66 ; see *Mortlock v. Buller*, 10 Ves. jun. 314.

(*x*) *Att. Gen. v. Day*, 1 Ves. 218.

(*y*) *Att. Gen. v. Day*, 1 Ves. 218.

(*z*) *Casamajor v. Strode*, 1 Sim. & Stu.

(1) Where a person becomes a purchaser under a decree of the Court of Chancery, he submits himself to the jurisdiction of the Court in that suit, as to all matters connected with such sale, or relating to him in the character of purchaser. *Requa v. Rea*, 2 Paige, 339 ; *Wood v. Mann*, 3 Sumner C. C. 318.

SECTION II.

OF THE PRACTICE IN IRELAND.

[As this Section contains only a statement of the local practice in Ireland, it is deemed superfluous to retain it in this place.]

*SECTION III.

OF OPENING THE BIDDINGS, AND OF RESCINDING
THE CONTRACT.

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| <ol style="list-style-type: none"> 1. <i>Opening biddings.</i> 3. <i>Advance required.</i> 5. <i>When report absolutely confirmed advance of price not sufficient.</i> 12. <i>Fraud sufficient.</i> 13. <i>Costs of first purchaser.</i> 14. <i>Re-allotment upon re-sale.</i> 16. <i>Person present at sale may open it.</i> 17. <i>Sham biddings.</i> 18. <i>Person opening not repaid his costs.</i> 20. <i>Where lots, all to be opened.</i> 21. <i>Opening sale of lots to different purchasers.</i> | <ol style="list-style-type: none"> 22. <i>Substitution of sub-purchaser.</i> 23. <i>Return of stock on rescinding contract.</i> 24. <i>Inequitable sale rescinded.</i> 25. <i>But not a hard bargain.</i> 26. <i>Unless there is mistake.</i> 28. <i>But there must be no delay.</i> 29. <i>Solicitor bound although only buying in.</i> 30. <i>Remedy against executors.</i> 31. <i>No costs to purchaser of extended estate although no title.</i> |
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1. Thus far we have traced a sale before a Master where no opposition is made to the absolute confirmation of the Master's report of the best bidder, and the sale is regularly concluded. But where estates are sold before a Master under the decree of a court of equity, the Court considers itself to have a greater power over the contract than it would have were the contract made between party and party (*a*); and as the chief aim of the Court is to obtain as great a price for the estate as can possibly be got, it is in the habit of opening the biddings after the estate is sold (1).

(*a*) See 1 P. Wms. 747.

(1) It appears from the report of the case of *Wood v. Mann*, 3 Sumner, C. C. 318, 319, that the biddings were re-opened under a decretal order of the Court. But the English practice of opening biddings, upon an advance on a Master's sale, is not recognized in New York, North Carolina, Maryland, Tennessee, New Jersey, or South Carolina; *Gardner v. Schermerhorn*, 1 Clarke, 101; *Andrews v. Scotton*, 2 Bland, 629; *Young v. Teague*, 1 Bailey Eq. 14; *Seaman v. Riggins*, 1 Green Ch. 214; *Williamson v. Dale*, 3 John. Ch. 290; *Henderson v. Lowry*, 5 Yerger, 230; *Gordon v. Sims*, 2 M'Cord Ch. 158; and the Chancellor of New York, in *Duncan v. Dodd*, 2 Paige, 100, observes, that it is not desirable that it should be introduced there. See also to the same effect, *Collier v. Whipple*, 13 Wendell, 224. See farther upon the practice of opening biddings, *Scott v. Nesbit*, 3 Bro. C. C. (Perkins' ed.) 475, notes (1), (*a*) and (*b*), and cases cited; *Anon.* 1 Sumner's Vesey, 453, note (*a*) and cases cited; *Andrews v. Emerson*, 7 Sumner's Vesey, 420, note (*a*); *Chetham v. Grugeon*, 5 ib. 86, note (*a*); *Anders-*

2. Where a person is desirous of opening a bidding, he must, at his own expense, apply to the Court, by motion for that purpose, stating the advance offered. Notice of the motion must be given to the person reported the purchaser of the lot, and to the parties in the cause (*b*). If the Court approve of the sum offered, the application will be granted, and on the order being drawn up, entered and served, a new sale must be had before the Master. The order is made at the expense of the person opening the biddings, and he must bear the expense of paying in his deposit, and pay the costs of the first purchaser (*c*), and interest at the rate of 4*l.* per *cent. on such part of the purchase-money as the Master shall find to have lain dead (*d*).

3. Mere advance of price, if the report of the purchaser being the best bidder is not absolutely confirmed, is sufficient to open the biddings (*1*), and they will be opened more than once, even on the application of the same person, if a sufficient advance be offered (*e*); but the Court will stipulate for the price, and not permit the biddings to be opened upon a small advance (*f*); and, although an advance of 10 per cent. used generally to be considered sufficient on a large sum, yet no such rule now prevails (*g*); but 10 per cent. has been accepted upon a sum under 1,000*l.* (*h*); and in the case of a sale under a creditor's suit, the Court permitted the bid-

(*b*) For a form of the notice, see 2 jun. 140.
Turn. Pract. 649, 650.

(*c*) 2 Fowl. Pract. 318; 1 Turner's Pract. 131; see Sullivan v. Bayley, 1 Flan. & Kel. 460, as to investigation of title.

(*d*) This was directed on opening the biddings for Gen. Birch's estate, MS.

(*e*) Scott v. Nisbitt, 3 Bro. C. C. 475; Hodges v. Jones, 2 Fowl. Pract. 318; see Baillie v. Chaigneau, 6 Bro. P. C. by Toml. 313; Preston v. Barker, 15 Ves.

(*f*) Anon. 1 Ves. jun. 453; Anon. 2 Ves. jun. 487; Upton v. Lord Ferres, 4 Ves. jun. 700; and Anon. 5 Ves. jun. 148.

(*g*) Andrews v. Emerson, 7 Ves. jun. 4; White v. Wilson, 14 Ves. jun. 151. See Anon. 3 Madd. 494.

(*h*) Connell v. Hardie, 3 You. & Coll. 677; Bourn v. Bourn, 13 Sim. 189. As to the rule in Ireland, see Hutchins v. Hutchins, 1 Ir. Eq. Rep. 378.

son v. Foulke, 2 Harr. & Gill, 346. The biddings will not be opened in New York, except for special cause, and not then, unless the purchaser is fully indemnified for all damages, costs and expenses, to which he has been subjected. Duncan v. Dodd, 2 Paige, 100; Collier v. Whipple, 13 Wendell, 224; Lansing v. M'Pherson, 3 John. Ch. 425; Williamson v. Dale, 3 John. Ch. 290; Requa v. Rea, 2 Paige, 339; North River Ins. Co. v. Holmes, 1 Hoff. Ch. 146, 149; American Ins. Co. v. Oakley, 9 Paige, 257; Post v. Leet, 8 Paige, 357. So in South Carolina, Frazier v. Hull, 2 M'Cord Ch. 159 note (2). So in Maryland, Anderson v. Foulke, 2 Harr. & Gill, 346. So in Tennessee, Henderson v. Lowry, 5 Yerger, 240. See Wood v. Hudson, 5 Munf. 423. Biddings will not be opened in South Carolina because the price is too high or too low. Gordon v. Sims, 2 M'Cord Ch. 158.

The effect of opening the biddings is to discharge the purchaser from his purchase entirely. Price v. Price, 1 Sim. & Stu. 386.

(1) But see Gordon v. Sims, 2 M'Cord Ch. 158; Gardner v. Schermerhorn, 1 Clarke, 101; Tripp v. Cook, 26 Wendell, 143.

dings to be opened, upon an advance of 5 per cent. on 10,000*l.* (*i*). An advance of 350*l.* upon 5,300*l.* was refused, and it was said that the former cases only established that where an advance so large as 500*l.* is offered the Court will act upon it, though it be less than 10 per cent. (*k*). But in a *later* case, 300*l.* was accepted on 5,030*l.* (*l*), and 365*l.* (being 5 per cent.) on 7,300*l.* (*m*). Biddings, it seems, will not be opened unless 40*l.* at least be offered in advance (*n*); and the common rule does not apply to a colliery (*o*) (*1*).

4. Where the timber is separately valued, the price upon which the advance is to be made is the aggregate of the purchase-money and valuation of the timber (*p*).

5. The determinations on this subject assume a very different aspect when the report is absolutely confirmed. Biddings are in general not to be opened after confirmation of the report (*q*): increase of price alone is not sufficient, however large, although it is a strong auxiliary argument where there are other grounds.

6. In a case (*r*), however, before Lord Rosslyn, this rule, although so frequently acknowledged and acted upon, was not attended to, but biddings were opened after the report was absolutely confirmed, merely on an advance of price. This case is now completely overruled.

7. But very particular circumstances may perhaps induce the Court to open the biddings after confirmation of the report, if the advance be considerable (*I*).

(*i*) *Brooks v. Snaith*, 3 Ves. & Bea. 144.

(*k*) *Garstone v. Edwards*, 1 Sim. & Stu. 20; *Lefroy v. Lefroy*, 2 Russ. 606; *Cochrane c. Cochrane*, 2 Russ. & Myl. 684.

(*l*) *Lawrence v. Halliday*, 6 Sim. 296; see *Ward v. Cooke*, 9 Sim. 87.

(*m*) *Domville v. Berrington*, 2 You. & Coll. 723.

(*n*) *Farlow v. Weildon*, 4 Madd. 460; *Brookfield v. Bradley*, 1 Sim. & Stu. 23; *Leland v. Griffith*, 2 Moll. 510; see *Mayne v. Macartney*, 2 Ir. Eq. Rep. 324.

(*o*) *Williams v. Attenborough*, Turn. & Russ. 70.

(*p*) *Bates v. Bonner*, 6 Sim. 380.

(*q*) 2 Ves. jun. 53; *Scott v. Nisbitt*, 3 Bro. C. C. 475; *Boyer v. Blackwell*, 3 Anstr. 656; *Prideaux v. Prideaux*, 1 Bro. C. C. 287; 2 Ves. jun. 53; 1 Cox, 35; *Aubrey v. Denny*, 2 Moll. 508; *Vincent v. Thwaites*, 5 Ir. Eq. Rep. 526.

(*r*) *Chetham v. Grugeon*, 5 Ves. jun. 86; and see his Lordship's decision in *Prideaux v. Prideaux*, *ubi sup.* when Lord Commissioner.

(*I*) In Ireland, a sale under a decree was actually set aside after the purchaser was put in possession, and the conveyance to him executed and registered, because another person offered 200*l.* more than the purchaser had paid. *Conran v. Barry*, Vern. & Scriv. 111. See *Ex parte Partington*, 1 Ball & Beatty, 209; see 3 Mont. & Ayr. 545.

(1) There is in Ireland no fixed rule of advance; therefore the Court will always open the biddings, where it is for the benefit of the estate to do so. Dig-

8. Thus in a case (*s*) where the owner of the estate, (who joined in a motion for the purpose of opening biddings after the report was absolutely confirmed) was in prison at the time of the confirmation, and it appeared that he would have opened the biddings before confirmation of the report, had he been able, and had even directed persons to bid more than what the estate sold for, who deceived him, and an advance of 4,000*l*. (being more than one-fourth of the original purchase-money) was offered, the biddings were opened on the deposit of the 4,000*l*. being made.

9. Strong as the circumstances in this case were, Lord Eldon expressed great disapprobation of the decision, and determined generally, that after a purchaser has confirmed his report, unless some particular principle arises out of his character, as connected with the ownership of the estate, or some trust or confidence, or his own conduct in obtaining his report, the bidding ought not to be opened (*t*).

10. And Lord Redesdale, also, in a case before him, held that biddings could not be opened after the report was absolutely confirmed, unless on the ground of fraud on the part of the purchaser. And he considered it to the advantage of suitors to observe great strictness in opening biddings, as it would procure better sales (*u*).

*11. In a still later case, Lord Eldon adhered to the same rule, and said that he could not do a thing more mischievous to the suitors than to relax further the binding nature of contracts in the Master's office; half the estates that are sold in the Court being thrown away upon the speculation that there will be an opportunity of purchasing them afterwards by opening the biddings (*x*).

12. Fraud will, of course, be a sufficient ground for opening the biddings (*1*). Therefore, if the parties agree not to bid against each

(*s*) *Watson v. Birch*, 2 Ves. jun. 51;
4 Bro. C. C. 172.

(*u*) *Fergus v. Gore*, 1 Schoales & Le-
froy, 350.

(*t*) *Morice v. the Bishop of Durham*,
11 Ves. jun. 57.

(*x*) *White v. Wilson*, 14 Ves. jun. 151.

by *v. Browne*, 1 Irish Eq. 377. Whether the biddings will be opened or not is a question to be determined by the particular circumstances of each case. *Mayne v. Macartney*, 2 Irish Eq. 324; *O'Conner v. Richard*, Sausse & S. 246.

(1) *Collier v. Whipple*, 13 Wendell, 224; *Williamson v. Dale*, 3 John. Ch. 296; *Tripp v. Cook*, 26 Wendell, 146. So mistake in some cases. *Laight v. Pell*, 1 Edw. 577; *Gordon v. Sims*, 2 M'Cord Ch. 159; *Post v. Leet*, 8 Paige, 337; *Anderson v. Foulke*, 2 Harr. & Gill, 346; *Requa v. Rea*, 2 Paige, 339; *American Ins. Co. v. Oakley*, 9 Paige, 259. So a sale will be opened and a resale ordered when there is surprise upon any party in interest, created by the conduct of the

other (*y*), or a survey be made of an estate with some degree of collusion with the tenants (*z*), and it misrepresents the value and quality of the estate, and some of the purchasers are aware of this fraud in making the survey, and the owner is ignorant of it; or the purchaser of the estate be partner with the solicitor of the cause, and is in possession of some particular knowledge to the benefit of which the other parties were entitled (*a*) (1), or is the receiver, and buys in the name of a third person, without the leave of the Court (*b*); in all these cases the Court would open the biddings, although the report had been absolutely confirmed. And lately in Ireland biddings were opened after confirmation, because the plaintiff in a foreclosure suit was the purchaser, although he was by the practice at liberty to purchase (*c*).

13. Where the biddings are opened, the advance is to be deposited immediately (*d*), and the costs of the purchaser to be paid by the persons opening the biddings (*e*); but the Court will not direct the Master to allow a specific expense (*f*). If the last purchaser himself opened the biddings, the person again opening them must pay the costs of the former opening (*g*).

14. If the biddings are opened, the estate may be allotted for sale in a different manner to what it at first was (*h*).

15. As the biddings are opened for the benefit of the suitor, no other person will be favored in that respect. Thus, upon a motion to open a bidding of 5,020*l.* (*i*), upon the ground of mistake as *to the time of sale, and an over-bidding of 150*l.*; the Lord Chancellor refused it, saying, he would not open it for a less sum than 500*l.*, and that the circumstance that the bidder was too late was no ground at all.

16. The person who is desirous of opening the biddings having been present at the sale, and having bid, is no objection to their

(*y*) See 2 Ves. jun. 52.

(*z*) *Ryder v. Gower*, 6 Bro. P. C. 148; and see 2 Ves. jun. 53.

(*a*) *Price v. Moxon*, July 14, 1754, before Lord Hardwicke. See 6 Bro. P. C. 155; 2 Ves. jun. 54.

(*b*) *Alven v. Bond*, 1 Flan. & Kel. 196.

(*c*) *O'Connor v. Richards*, 1 Sauss. & Seul. 246: but see this explained in 1 Flan. & Kel. 210.

(*d*) *Anon.* 6 Ves. jun. 513. See *Anon.* 1 Hayes & Jo. 719.

(*e*) See *Watts v. Martin*, 4 Bro. C. C. 113; and see *ibid.* 178; *Upton v. Lord Ferrers*, 4 Ves. jun. 700. See *Digby v. Browne*, 1 Ir. Eq. Rep. 377.

(*f*) *Anon.* 1 Ves. jun. 286.

(*g*) See 6 Sim. 382.

(*h*) *Watts v. Martin*, 4 Bro. C. C. 113. See *Ward v. Cooke*, 9 Sim. 87.

(*i*) *Anon.* 1 Ves. jun. 453.

purchaser or other person directing the sale; so when the interests of infants are concerned in opening the sale, or where a guarantor has misunderstood his liability. *Gardner v. Schermerhorn*, 1 Clarke, 101; *Francis v. Church*, 1 Clarke, 475.

(1) See *Brinkerhoff v. Brown*, 4 John. Ch. 675.

being opened, although a greater advance may, on that account, be required (*k*). Nor is it material that the applicant is entitled to a part of the produce of the estates (*l*).

17. A man opening the biddings on behalf of a person not in existence, will himself be decreed to be the purchaser, and sham biddings on such a resale will be set aside by discharging the report of the bidders being the best, and the Master will be directed to report the person who procured the biddings to be opened as the best bidder at the price at which he opened them (*m*), although this might not fully meet the justice of the case in some instances.

18. Where a person is permitted to open the biddings upon the usual terms, paying the costs, and making a deposit, and the estate is bought by another person, the person opening the biddings is entitled to take back his deposit; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding (*n*).

19. Under special circumstances, however, they might be allowed. If a person came forward for the benefit of the family, and the estate at the first sale was knocked down by mistake, or sold at a great under-value, he would be allowed his expenses (*o*).

20. It seems, that if a person purchase several lots of an estate and the biddings are opened as to one, he shall have an option to open them all (*p*). The person desirous of opening the biddings as to some of the lots must submit to take the others at the sum *for which they were sold, if the purchaser desires to relinquish them, and they shall not upon the resale fetch that sum (*q*). This is with a view to protect the estate from loss.

In two late cases the distinction was taken that where the lots, the biddings for which are sought to be opened, were purchased before the other lots bought by the same purchaser, he is entitled

(*k*) *Rigby v. M'Namara*, 6 Ves. jun. 117. See *Tait v. Lord Northwick*, 5 Ves. jun. 655; see 15 Ves. jun. 14; and see *M'Culloch v. Cotbach*, 3 Madd. 314, where the Vice-chancellor ruled *contra*; but the rule is established by *Thornhill v. Thornhill*, 2 Jac. & Walk. 347; *Pearson v. Pearson*, 13 Price, 213; *Tyndale v. Warre*, Jac. 525; *Lefroy v. Lefroy*, 2 Russ. 606; *Biggs v. Rowe*, 1 Saus. & Seal. 152.

(*l*) *Hooper v. Goodwin*, Coop. 95.

(*m*) *Molesworth v. Opie*, 1 Dick. 289.

(*n*) *Rigby v. M'Namara*, 6 Ves. jun.

466; *Earl of Macclesfield v. Blake*, 8 Ves. jun. 214; *Trefusis v. Clinton*, 1 Ves. & Beam. 361; *Chester v. Gorges*, 2 Moll. 505.

(*o*) *Earl of Macclesfield v. Blake*, *ubi sup.*; *Owen v. Foulkes*, 9 Ves. jun. 348; *West v. Vincent*, 12 Ves. jun. 6; *Chapman v. Fowler*, 3 Hare, 577. See *Filder v. Bellingham*, 1 Coll. N. C. 526, where interest also was allowed.

(*p*) See *Boyer v. Blackwell*, 3 Anstr. 657; *ex parte Tilsley*, 4 Madd. 227, n.; see 2 Myl. & Cra. 726, 731.

(*q*) *Bates v. Bonnor*, 6 Sim. 380.

to have the biddings opened as to *all* the lots (*r*) ; but the rule ought to be universal.

21. Where several lots are sold to different purchasers, a separate motion must be made to open the biddings for each lot ; one motion to open all, although on an advance of a certain sum for each lot, will not be permitted (*s*).

22. If after the report is absolutely confirmed, the purchaser sell to another, the second purchaser may be substituted in the place of the first purchaser, although he (the first purchaser) is dead and his heir is abroad (*t*).

23. If a purchase be rescinded, and the purchaser has paid his money into court, and it has been laid out *upon his application*, he is to take back the stock, whether the funds have fallen or risen since the investment (*u*).

24. The authority which the Court has over these contracts enables it in a proper case to relieve the purchaser as well as the suitor. Therefore, where the contract is inequitable, the purchaser, on submitting to forfeit his deposit, will be discharged from his purchase (*x*) (1).

25. Where, however, the contract is not inequitable, a purchaser must proceed in his purchase, and will not be permitted to forfeit his deposit, and abandon the contract, however disadvantageous it may be (2).

Thus, on an application to the Court by the person who opened the biddings for General Birch's estate (*y*), to forfeit their deposit, which was resisted by the creditors for whose benefit the estate was sold ; the Court held the purchasers to their bargain, and would not permit them to rescind the contract, although they had given a price which was considered much beyond the value of the estate.

*26. But where the purchaser has by *mistake* given an unreason-

(*r*) Price v. Price, 1 Sim. & Stu. 386.

(*s*) Goodall v. Pickford, 6 Sim. 379.

(*t*) Pearce v. Pearce, 7 Sim. 138.

(*u*) Hodder v. Ruffin, V. C., 21 Mar. 1825, MS.

(*x*) Savile v. Savile, 1 P. Wms. 745.

See 1 Per. & Dav. 387 ; 9 Adol. & Ell.

520 ; in Ireland, Gregg v. Glover, 1 Ir.

Eq. Rep. 211.

(*y*) MS. ; and see Sewel v. Johnson, Bunb. 76.

(1) See Gardner v. Schermerhorn, 1 Clarke, 101 ; Tripp v. Cook, 26 Wendell, 143 ; Reed v. Brooks, 3 Litt. 127 ; Hart v. Bleight, 3 Monroe, 273 ; Gist v. Frazier, 2 Litt. 118.

(2) Wood v. Mann, 3 Sumner, C. C. 318.

able price for the estate, the Court will in a proper case wholly rescind the contract (1).

27. This equity was enforced in the case of *Morshead v. Frederick* (z), where it appeared that Smiths, the bankers, were tenants in possession of the house in question, for which *they* paid two rents, one a ground rent of 56*l.* to the defendant, and the other an improved rent of 210*l.* to a third person. The house was directed to be sold, under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56*l.* and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the Master, and the money paid into the Bank. The purchasers then moved the Court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210*l.*; and that he was ignorant of the existence of it at the time he made his valuation: and the Court ordered the purchase-money to be repaid, and rescinded the contract. This, however, may be considered a strong case. It might be argued that the purchasers' only equity was their own negligence.

28. If a party be entitled to come to the Court to rescind a sale not completed by conveyance, on the ground of mistake, he must not be guilty of delay after the mistake is discovered (a) (2).

29. Although the solicitor in the cause buy in an estate merely to prevent a sale at an undervalue, yet if he act without authority he will not be discharged from his purchase. Lord Eldon has said, that it would be a very wholesome rule to lay down, that the solicitor in the cause should have nothing to do with the sale; as the certain effect of a bidding by the solicitor in the cause is that the sale is immediately chilled (b).

(z) Ch. 20 Feb. 1806, MS. App. No. 7. See *Coote v. Coote*, 2 Ir. Eq. Rep. 159.

(a) *Price v. North*, 2 You. & Coll. 620.

(b) *Nelthorpe v. Pennyman*, 14 Ves. jun. 517. See *ex parte Tomkins*, Ch. 23 Aug. 1816, MS. App. No. 8; *ex parte Lucas*, 1 Mont. & Ayr. 93.

(1) So a sale was set aside at the instance of the purchaser, on account of a serious mistake in the representation of the lands. *Gordon v. Sims*, 2 M'Cord Ch. 159; *Laight v. Pell*, 1 Edw. 577. So a sale was set aside because the property was knocked off to the purchaser prematurely, by a mistake of the auctioneer, who did not hear a higher bid. *Gordon v. Sims*, 2 M'Cord Ch. 159. See *Anderson v. Foulke*, 2 Harr. & Gill, 346. See, for other causes for which a resale will be ordered, *Millspaugh v. McBride*, 7 Paige, 509; *Tripp v. Cook*, 26 Wendell, 143; *Brown v. Frost*, 10 Paige, 243; *American Ins. Co. v. Oakley*, 9 Paige, 259.

(2) *Hough v. Richardson*, 3 Story C. C. 659; *Doggett v. Emerson*, 3 Story C. C. 700; *Veazie v. Williams*, 3 Story C. C. 611; *Vigers v. Pike*, 8 Clarke & Fin. 526.

30. Where a person bought under the decree for another who died without having adopted the contract, although an order *nisi* to confirm the purchase in his name had been obtained, the Court refused to order the executors of the purchaser to pay the purchase-money, and the heir declining the purchase, the order *nisi* was set aside, and a re-sale ordered, and the consideration as to any deficiency that might arise on the re-sale, and by whom the costs of it were to be repaid, were reserved; it was held that the executors, in a purchase by their testator from the Court, could not be compelled by the heir to pay for the estate without filing a bill (c).

31. If an extended estate be sold under the 25 Geo. 3, c. 35, and the sale be confirmed by the Remembrancer's report, and the usual orders, yet where a good title cannot be made, the Court of Exchequer will, upon the motion of the Crown, discharge the purchaser without payment to him of any costs incurred in investigating the title, or in procuring the reports (d).

(c) Lord v. Lord, 1 Sim. 503.

(d) Rex v. Cracroft, 1 M'Clel. & You. 460.

*CHAPTER III.

OF PAROL AGREEMENTS.

WITH a view to prevent many fraudulent practices which were commonly endeavored to be upheld by perjury, it was enacted by the 29 Car. II. c. 3, usually called the statute of frauds, that (*a*) "all leases, estates, interests of freeholds, or terms of years, or any uncertain interests of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made and created by livery and seisin only, or by parol, and not put in writing by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the effect of leases or estates at will, any consideration for making any such parol leases or estates notwithstanding." But, nevertheless, leases not exceeding three years, whereupon the reserved rent should amount to two-thirds of the full improved value, were excepted (*b*). The Act then requires the assignment, grant, and surrender of existing interests to be made by writing (*c*); and then (*d*) enacts that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them (I), unless the agreement, upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In treating of these legislative provisions, we may consider—
 1. What interests are within the statute:—2. What is a sufficient agreement:—3. What agreements will be enforced, although by parol:—and we may reserve for a separate chapter the consideration of the cases in which parol evidence is admissible to vary or annul written instruments.

(*a*) Sect. 1.
 (*b*) Sect. 2.

(*c*) Sect. 3.
 (*d*) Sect. 4.

(I) "Or upon any agreement not to be performed within a year;" which clause does not extend to any agreement concerning lands. *Hollis v. Edwards*, 1 Vern. 159. It is quite clear, that an agreement for sale of lands must be in writing, although the contract is to be performed the next day. See *Bracebridge v. Heald*, 1 Barn. & Ald. 722.

*SECTION I.

OF THE GENERAL CONSTRUCTION OF THE STATUTE.

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| 1. <i>Construction of first section.</i>
3. <i>Construction of fourth section.</i>
5. <i>Construction of third section. Sta-</i>
<i>tute of 8 & 9 Vict.</i> | | 6. <i>Parol license valid.</i>
8. <i>Collateral agreement valid.</i>
9. <i>Void agreement may operate as a</i>
<i>license.</i> |
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1. It was observed in the case of *Crosby v. Wadsworth* (e), that collecting the meaning of the first section by aid derived from the language and terms of the second section, and the exception therein contained, the leases, &c. meant to be vacated by the first section, must be understood as *leases* of the *like* kind with those in the second section, but which conveyed a *larger interest* to the party *than for a term of three years*, and such, also, as were made *under a rent reserved thereupon*; and the Court therefore determined that a sale of a standing crop of mowing grass, then growing, was not within the first section of the statute, because neither of the foregoing circumstances was to be found in the agreement, although, as the agreement conferred an exclusive right to the vesture of the land during a limited time, and for given purposes, it was, the Court held, *a contract* or sale of *an interest in*, or at least an interest *concerning lands*.

2. It was not, however, necessary in the above case, to decide upon the precise construction of the first section, which seems in this respect to be co-extensive with the fourth, and, consequently, every interest which is within the fourth section is equally within the first, unless it come within the saving of the second section. The first and second sections appear to enact, that all interests actually created without writing shall be void, unless in the case of a lease not exceeding three years, at nearly rack-rent, which exception must have been introduced for the convenience of mankind, and under an impression that such an interest would not be a sufficient temptation to induce men to commit perjury. Perhaps, therefore, the first section ought to extend to every pos-

(e) 6 East, 610.

sible interest which is not within the exception in the second *clause. If an estate, of whatever value, should be conveyed to a purchaser by livery of seisin, without writing, the act would avoid the estate, although the purchaser had paid his money. An actual lease for any given number of years, whether with or without rent, or any interest uncertain in point of duration, must, it should seem, equally fall within the provision of the first section, and cannot be sustained unless it come within the saving in the second section (f).

3. This, however, of itself would not have prevented all the evils which the act intended to avoid; for although actual estates could not be created, yet still *parol agreements* might have been entered into respecting the future creation of them. To remedy this mischief, the provision in the fourth section was inserted, which, it is conceived, relates not to contracts or sales of land, &c., but to any *agreement* made upon any contract or sale of lands, &c. (I), and as agreements were more to be dreaded than contracts

(f) See Lord Bolton *v.* Tomlin, 5 Adol. & Ell. 857, for the extent of the second section; as to the first section, see Cooch *v.* Goodman, 2 Adol. & Ell. N. S. 596.

(I) This appears to be the true meaning of the statute, although this branch of the fourth section has been sometimes read as a distinct clause, in which case the word *agreement* is dropped, and the clause runs thus, "no action to be brought upon any contract or sale of lands," &c. See Anon. 1 Ventr. 361, and 6 East, 611, and *Mechelem v. Wallace*, 1 Nev. & Per. 224; but this clause seems to be governed by the preceding one in the same section, as to agreements made upon consideration of marriage. The statute says, no action to be brought, "to charge any person upon any *agreement made upon* any consideration of marriage, or upon [any agreement made upon] any contract or sale of lands," &c. The words between crotchets must, it is submitted, be implied. At the same time, there is certainly ground to contend, that the clause would have the same operation if not governed by the words in the preceding clause.

The statute seems to have been strangely misunderstood in the case of *Charlewood v. Duke of Bedford*, 1 Atk. 497, the report of which agrees with the Registrar's book. The object of the bill was to compel the performance in specie of a *parol agreement*, by the Duke's steward, to grant a lease. The case, therefore, fell within the fourth section, but the defendant pleaded the first, and to bring his case within it, stated the words of the statute, at the close of that section, to be "any *contract* for making such lease, or any former law to the contrary notwithstanding." The words really are "any *consideration*," &c. The framer of the plea must have adopted an error which has been sometimes entertained, that the first section relates to leases, and the fourth to sales, and this notion compelled him to alter the statute in the way he did, for he could not otherwise have brought his case within it. It is observable that Lord C. B. Conyns, before whom the cause was heard, did not notice the mistake.

Lord Keeper North seems to have entertained the erroneous opinion above noticed; for, in a case which came before him on a *parol agreement* for a lease, he said that the difficulty that arose upon the act was that it makes void the estate, but does not say the agreement itself shall be void, and therefore, though the estate itself is void, yet, possibly, *the agreement may subsist*, so that a man may recover damages at law for the non-performance of it; and if so, he should not doubt to decree it in equity; and he actually sent the parties to law, in order to have the

*actually executed, no exception was inserted after the fourth section, similar to that which follows the first section, and consequently an *agreement* by parol, to create even such an interest as is excepted in the second section, would be merely void (1).

4. If this be the true construction of the Act, it answers the purposes for which it was passed, and the question in all cases must be — Is the interest in dispute actually created by the parties, or does the contract rest *in fieri*? If it be actually created, it is avoided by the first section, unless saved by the second. If it be not actually created, the agreement cannot be enforced by reason of the fourth section, whatever be the nature of it. But if the first section were to be restrained beyond the express provisions of the second section, then, although every parol *agreement* for any interest in lands would be void, yet many estates might still be actually raised by parol. The first section, however, seems to embrace *interests* of *every* description, whilst the exception relates only to *leases* of a *particular* description. One consequence of qualifying all the interests specified in the first section, in the manner proposed by the aid derived from the second section, would be, that an estate in fee might still, as formerly, be conveyed by livery of seisin without writing. But if the doctrine should even be confined to *leases*, it would open a considerable door to perjury. If the two requisites are to concur to bring a lease within the first section, namely, a larger interest than that mentioned in the second section, and a reserved rent, then it should seem that a lease by parol for a thousand years without rent would be valid, notwithstanding the statute. If one only of these requisites be essential, yet cases of importance may be taken out of the Act; an estate, however valuable, may be claimed under a parol lease for any term short of three years without rent. This is the temptation to perjury which the statute intended to remove. And this mischief must necessarily follow, that if the parties swear to an *agreement* for such an interest, it will be within the statute;

point decided, and for that purpose directed the defendant to admit the agreement. *Hollis v. Edwards*, 1 Vern. 159. The plaintiff was of course nonsuited in the action, and thereupon Lord North dismissed the bill. His impression before the trial must, it should seem, have been that the first section related to leases, and the fourth only to sales; or at least he must have thought that the fourth did not embrace *agreements* for leases.

(1) A parol contract to buy land jointly and divide it, is void under the statute of frauds. *Henley v. Brown*, 1 Stewart, 144. So an agreement to procure another to enjoy land. *Gray v. Patton*, 2 B. Monroe, 12.

whereas if they swear to an actual demise, the case will be taken out of the statute.

5. The construction suggested in *Crosby v. Wadsworth*, of the first section of the statute, has since been attempted to be extended to the third section. It has been contended that the leases mentioned *in the third section, as requiring to be assigned by writing, must be intended such leases as are required by the first and second sections of the statute to be created by deed or writing, viz. leases conveying a larger interest to the party than for a term of three years ; but the Lord C. Baron, at *nisi prius*, ruled otherwise. And now by statute law a *feoffment*, except one made under a custom by an infant, is made void in law, unless evidenced by deed and a *partition* and *exchange* (except of copyhold), and a *lease* required by law to be in writing, and an *assignment* of a chattel interest (not being copyhold), and a *surrender* in writing of an interest in any hereditament not being a copyhold, and not being an interest which might by law have been created without writing, will be void in law unless made by deed ; but this does not extend to Ireland as far as relates to a surrender (g).

6. It has been decided, that a mere license is not within the first section of the statute of frauds(1). This was decided in the case

(g) 8 & 9 Vict. c. 106, s. 3 ; the word release in this section seems to relate to s. 2, see *post*, ch. 11, s. 6 ; and see 7 & 8 Vict. c. 76, s. 3, and observe its duration. See *Mollett v. Brayne*, 2 Camp. Ca. 103 ; *Stone v. Whiting*, 2 Stark. Ca.

235 ; *Thomson v. Wilson*, 2 Stark. 379 ; *Phipps v. Sculthorpe*, 1 Barn. & Ald. 50 ; *Thomas v. Cook*, 2 Stark. Ca. 408 ; 2 Barn. & Ald. 119 ; *Dodd v. Acklom*, 6 Mann. & Gran. 672.

(1) If a license is to be understood, as merely an authority to do a particular act, or series of acts, upon another's land, without passing any estate or interest in the land, then there appears to be no reason to controvert the position, that a mere license is not within the statute of frauds. This is the definition of a license given by Mr. Chief Justice Parker, in *Cook v. Stearns*, 11 Mass. 537 ; and he gives as instances, a license to hunt in another's land, or to cut down a certain number of trees. Such licenses, he says, do not in any measure trench upon the policy of the law, which requires that bargains, respecting the title or interest in real estate, shall be by deed or writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But licenses, which in their nature, amount to the granting of an estate, for ever so short a time, are not good without deed, and are considered as leases. A permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by the statute of frauds. The decision in *Cook v. Stearns* was fully approved in *Mumford v. Whitney*, 15 Wendell, 380, where the cases are ably reviewed and discussed by Chief Justice Savage. The same decision is approved also by Mr. Chief Justice Williams in *Prince v. Case*, 10 Conn. 375, who ably considers the cases and the principle on which they are founded. And in

of *Wood v. Lake* (h). A parol agreement was entered into for liberty to stack coals on part of a close for, seven years, and that during this term the person to whom it was granted should have

(h) Say. 3; and see *Winter v. Brockwell*, 8 East, 308; *Rex v. Inhabitants of Standon*, 2 Mau. & Selw. 461; *Taylor v. Waters*, 2 Marsh, 551; 7 Taunt. 74; *Wood v. Manley*, 11 Adol. & Ell. 34; *Rex v. Inhabitants of Horndon*, 4 Mau. & Selw. 562; *Cocker v. Cowper*, 1 Cro. Mees. & Rosc. 418.

Maine, the cases of *Seidensparger v. Spear*, 17 Maine, 123, was decided on the same principles. The same case came under review in the same court, in *Stevens v. Stevens*, 11 Metcalf, 251, 257, and its doctrines were reaffirmed. The above definition of a license is substantially adopted by Mr. Chancellor Kent, in his *Commentaries*, 3 vol. 452. And he adds, that a license is founded in personal confidence, and is not assignable, nor within the statute of frauds. And the learned Chancellor very justly remarks that "this distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a license which may be by parol, is quite subtle, and it becomes difficult, in some of the cases, to discern a substantial difference between them." In *Whitmarsh v. Walker*, 1 Metcalf, 313, it was decided, that a license, to enter upon land, and remove mulberry trees therefrom, which were growing in a nursery and raised to be sold and transplanted, and which had been sold by the defendant, the owner of the nursery, to the plaintiff, passes no interest in the land, and, though not in writing, is valid notwithstanding the statute of frauds. It was admitted in the case that the defendant, the owner of the nursery, had a legal right to revoke his license. But if he exercised his legal right in violation of his agreement, to sell the trees and give liberty to enter and remove them, to the prejudice of the plaintiff, the purchaser, the court held that he would be responsible in damages. "If" say the court, "for a valuable consideration, the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it, and if he refused to comply with his agreement, he is responsible in damages."

In *Claffin v. Carpenter*, 4 Metcalf, 583, Mr. Justice Wilde said, "A license to enter on the land of another, and do a particular act or a series of acts, may be valid, though not granted by deed or in writing. Such a license does not transfer any interest in the land, although when granted for a valuable consideration, and acted upon, it cannot be countermanded." This was said in a case of a sale of growing wood and timber, to be cut and removed by the purchaser, which was held not to be a contract for the sale of any interest in or concerning lands, &c. within the statute of frauds. In *Nettleton v. Sikes*, 8 Metcalf, 34, an oral agreement had been made by the plaintiff and owner of land, that the defendant might cut down the trees on the land, and peel them, and take the bark to his own use. After the defendant had cut down and peeled the trees, the plaintiff forbid his going upon the land to take away the bark, but the defendant proceeded, entered upon the plaintiff's land and took the bark away. The plaintiff sued him in trespass for breaking and entering his close. The court said, "In the present case, when the bark was peeled, it became the property of the defendant, by the terms of the contract, and if the plaintiff had taken it away, he would have been liable to the defendant in an action of trover. The bark being the property of the defendant, and being on the plaintiff's land with his consent, and in pursuance of the contract, he had no right to prevent the defendant from taking it away." See *Wood v. Manley*, 11 Adol. & Ellis, 34. This case of *Nettleton v. Sikes*, it will be perceived, goes one step farther than that of *Whitmarsh v. Walker*, in which latter case, it was conceded that the owner of the land might lawfully revoke his license, whereas in *Nettleton v. Sikes*, such license to revoke is expressly denied. These cases seem to come entirely within the definition of a license given above.

But in *Stevens v. Stevens*, 11 Metcalf, 251, there was an agreement for an interest in land of a more permanent character, and being by parol, the court held it to be of no legal validity as against a subsequent grantee of the land. In this case S. gave to J. an oral license to erect and continue a mill dam on S.'s land, and to dig a ditch through said land, to convey water to a mill that J. was about

the sole use of that part of the close upon which he was to have the liberty of stacking coals (I). Lee, C. J., and Dennison, held the agreement to be good. They relied upon the case of Webb

(I) Sayer is but an inaccurate reporter. It is not stated, but the fact is, that an annual payment was reserved in respect of the easement.

to build on his own land; J. erected the dam and dug the ditch, and afterwards erected the mill, and continued them through the life of S.; After S. had granted said license, he conveyed his land to M., without any reservation; J. continued the dam and ditch, after the decease of S., for the purpose of working said mill, and M. requested him to remove the dam and fill up the ditch, and, upon J.'s refusal so to do, M. attempted to remove the dam, and tore down a part of it, and J. forcibly interposed, prevented M. from proceeding farther, and repaired the injury so done to the dam by M. The court held that J. was not responsible for any acts done in pursuance of the license before it was countermanded, and therefore was not liable to pay any expenses incurred by M. in removing the old dam; but that he was liable for building a new dam or repairing the old one, after the license was countermanded, and that M. was entitled to have the same abated at the expense of J. In this case Wilde J. said; "The defendants claim a permanent interest in the plaintiff's land, and this claim has been maintained by force, against the will of the plaintiff; and there is no case in which it has been decided that such an interest can be created by parol. Such a decision would be against the express language of the statute of frauds. In the case of Wood v. Lake, Sayer, 3, it was decided by a majority of the court, that a parol agreement, granting a license to stack hay on the land of the grantor for seven years, was a valid contract, notwithstanding the statute of frauds. It is said in that case, that the agreement was only for an easement, and not for an interest in the land. But the true ground of the decision appears to be, that the agreement was not within the words of the statute, not being an agreement, for any uncertain interest in land. If this was the ground of decision in that case, it would not be applicable to the provision in Mass. Rev. Stat. c. 57, § 29. But it is perfectly well settled, in England, that no incorporeal right, in the nature of an easement, can be created or conveyed by a parol agreement; *although a parol license may be an excuse for a trespass, till such license is countermanded*; and that a freehold interest can be created or conveyed only by deed."

In *Sampson v. Burnside*, 18 N. Hamp. 264, it was decided that a parol license, to enter on land and lay down aqueduct logs, for the purpose of conveying water from a spring to adjoining land, with license to enter from time to time to examine and repair the same, is not a sale of land, or an interest in land, within the statute of frauds, so far as that such license may not be set up in answer to an action of trespass for an entry on the land under such license, while it remains unrevoked. Upham J. in this case said; "Where a license is given, and entry made in pursuance of it, the individual entering is of course not a wrong doer. He cannot be regarded as guilty of a trespass, when he entered by express permission of the owner of the land, any more than the servant, who enters on land while in the ordinary employ of his master and under his immediate direction, can be regarded as a trespasser. That a license may be given, and the person receiving it act under it without being liable as a trespasser, until it has been revoked prior to suit, seems not to have been contested. In the case of *Mumford v. Whitney*, 15 Wendell, 380, Mr. Chief Justice Savage, held that a license was a mere authority to do a particular act, as to hunt, or fish, or erect a temporary dam, and conveyed no interest in land. Such license is executory, and may be revoked at pleasure; but acts done under it before revocation are no trespass. In *Bridges v. Purcell*, 1 Dev. & Bat. 492, it was held, that a mere license is revocable, but acts done under it until countermanded are lawful. And in *Barnes v. Barnes*, 6 Vermont, 388, it is held that a license to erect a building on another's land cannot be revoked so entirely as to make the person who erected it a trespasser for entering and removing it after the revocation." Whether the license given in the case of *Sampson v. Burnside*, was one, which, when executed by an entry on the land and laying down the aqueduct logs, could be revoked without full remuneration for the expense incurred, was a question raised and left undecided in

and Paternoster (i), where they said it is laid down, that a grant of a license to stack hay upon land, does not amount to a lease of the land. As the agreement in the present case was only for an easement, and not for an interest in the land, it did not amount to a lease, and consequently it was not within the statute of frauds. Mr. Justice Forster concurred in opinion, that the agreement did *not amount to a lease, but he inclined to be of opinion, that the words in the statute, any *uncertain interest in land*, did extend to this agreement: but Lee and Dennison thought those words re-

(i) Palm. 71.

that case, although previous cases in the same court seem to hold that such revocation could not take place without the remuneration. As where the owner of land, gave to another person a parol license to erect a dam on the land of the former, for the benefit of both, it was held that after the license had been executed, it could not be revoked without a tender of the expenses of erecting the dam, by the owner of the land, to the person erecting it. *Woodbury v. Parshley*, 7 N. Hamp. 237. Such a license was held in this case not to be within the statute of frauds and not to require a contract in writing to support it. "Certainly," say the court, "the owner of the land could not revoke this license without tendering to the person erecting the dam the expenses that had been incurred in the project." The case of *Ameriscoggin Bridge v. Bragg*, 11 N. Hamp. 102, was very similar to the preceding. The court there held, that a license to build and maintain a bridge on another's land may be proved by parol, and is not such an easement or interest in land as to be within the statute of frauds; and that such license is either irrevocable, or can only be revoked on payment of all expense and damage. "A license," say the court, "to an individual to do an act beneficial to him, but requiring an expenditure upon another's land, is held not to be revocable after it has been once acted upon. Such a license is a direct encouragement to expend money; and it is said, it would be against conscience to revoke it as soon as the expenditure begins to be beneficial. A license to erect a dam on another man's land is held to be of this description. A license to erect a bridge for the taking of toll is clearly distinguished from a mere easement of passing and repassing; and we think when it is once executed it is either irrevocable while the bridge continues; or, if revocable at all, can only be so on full compensation for all expenditures made, and damage occasioned, by such revocation." If by this it is to be understood that an erection of the kind suggested in these cases, by one person on the land of another, under such a license, may be maintained against the will of the owner of the land, until it decays, or until payment is made for the expenditure of the erection, the doctrine certainly may well be regarded as open to a great deal of doubt. That the permission should be regarded as an excuse for what would otherwise be a trespass or a series of trespasses up to the time of revocation, it is easy to perceive. This latter doctrine is well supported by the authorities. The other, though supported by some highly respectable authorities, is yet open to great difficulties, as effected by the statute of frauds. The expenditure made under the license may perhaps supply the place of a consideration for the license, and how does it meet the necessity of a writing? In *Wilson v. Chalfant*, 15 Ohio. 248, it was decided, that, if one enters on the land of another by virtue of a parol license, given for a consideration paid, and erect fixtures, such license becomes irrevocable, and trespass will lie against the owner of the land for destroying them. Such license executed gives the right of possession to control, repair, and protect the fixtures against the owner of the fee.

The cases on the subject of license are very fully and ably discussed, and some learned and subtle distinctions taken in *Gale & Whatley on Easements*, Ch. 3. p. 19 et seq.; 2 *Amer. Lead. Cas.* by Hare & Wallace, 506 et seq. *Tit. License*; *Addison Contr. Ch.* 4. p. 86 et seq. Some of these distinctions are adverted to in *Stevens v. Stevens*, 11 Metcalf, 254, 255 by Wilde J.

lated only to interests, which were uncertain as to the time of their duration. After time taken to consider, it was holden, that the agreement was good for the seven years.

7. The case referred to in Palmer does not seem to bear out the judgment in the above case; the decision turned upon another point: but Montague and Haughton both thought that the interest in that case was such as bound the land in the hands of a subsequent lessee. That case arose before the statute of frauds, and it would require a considerable stretch to make it apply to a case since the statute. No one will deny, that these cases are within the mischief against which the Legislature intended to guard. In Wood and Lake, the plaintiff was to have the sole use of the part of the land upon which he should stack his coals. How is this to be distinguished in substance from an actual demise for seven years? It appears to be in the very teeth of the statute, which extends generally to all leases, *estates* or *interests* (1). The statute expresses an anxious intention to embrace interests of every description. How can it be argued, that a license not countermandable, and which confers the sole use of a place on a man, is not an interest within the statute? Upon what principle is it, that the person entitled to such an easement may maintain trespass? This relaxation of the statute holds out a strong temptation to a man in possession of land, under a parol agreement, to commit perjury, in order to ensure to himself a more permanent interest in the land than the statute would permit him to claim, were the real transaction disclosed. The case of Wood v. Lake has, however, been followed in several recent cases (k) (2).

(k) See the last note.

(1) See *Stevens v. Stevens*, 11 Metcalf, 255, 256.

(2) See ante 96 note; The remarks of Wilde J. on Wood v. Lake, in *Stevens v. Stevens*, 11 Metcalf, 255, 256; Sampson v. Burnside, 13 N. Hamp. 266; Prince v. Case, 10 Conn. 375. In Gale & Whatley, on Easement, Ch. 3, after an able review and discussion of the English cases relating to the point decided in the cases of Webb v. Paternoster & Wood v. Lake, the learned authors conclude, that the strong current of the later authorities is against them, and add, that "authority is hardly necessary to countervail these two cases, as in neither, as was observed by the court of King's Bench in *Hewlins v. Shippdam*, 5 Barn. & Cress. 221, does it appear that the objection was taken, that the right lay in grant, and therefore could not pass without deed; in addition to which it may be observed, that the case in Sayer is of doubtful authority." It is also stated that the case of Webb v. Paternoster, is in reality a mere dictum, as the court was not called upon to decide the question as to the validity of the license, pp. 27, 44, 45. Mr. Chancellor Kent says: "The case of Wood v. Lake, which held a parol agreement for the liberty to stack coal upon any part of the close of another, for seven years, to be valid, was questioned at the time by Mr. Justice Foster, and it has been since forcibly attacked by Sir Edward B. Sugden, in his treatise of the Law of Vendors and Purchasers, and was questioned also in *Phillips v.*

8. It has been decided, that if, after a lease has been granted, the landlord make improvements on the estate, in consideration of an agreement to pay an additional sum per annum, the sum is not rent, and the agreement is collateral to the lease, and may therefore be recovered upon, although by parol (*l*).

9. An *agreement* under the fourth section which cannot be enforced on either side, is a contract void altogether, and yet may have, as an agreement, some operation in communicating a license so as to excuse what would otherwise be a trespass, but such license would be countermandable (*m*) (*l*).

(*l*) *Hoby v. Roebuck*, 2 Marsh. 433. East, 308; *Crosby v. Wadsworth*, 6 East,

(*m*) *Carrington v. Roots*, 2 Mees. & 602.
Wels. 257; see *Winter v. Brockwell*, 8

Thompson, 1 John. Ch. 144, 145; and yet that case has been recognized, and the doctrine of it sanctioned, by Lord Ch. J. Gibbs, in *Taylor v. Waters*. The decision in *Cook v. Stearns* narrows the limits assigned to a parol license, while, on the other hand, the cases of *Ricker v. Kelly*, 1 Greenl. 117, and *Clement v. Durgin*, 5 Greenl. 9, seem to approach and favor the more questionable doctrine in *Wood v. Lake*." In *Bridges v. Purcell*, 1 Dev. & Bat. 492, Mr. Justice Foster held, that the decision in *Wood v. Lake* was clearly wrong. See also *Mumford v. Whitney*, 15 Wendell, 380; *Miller v. Auburn Rail Road Co.* 1 Hill N. Y. 61; *Hays v. Richardson*, 1 Gill & John. 366; *Leland v. Gassett*, 17 Vermont, 403; *Wood v. Leadbitter*, 13 Mees. & Welsb. 837; *Harris v. Miller*, 1 Meigs, 158.

(*l*) See ante, 96 in note.

*SECTION II.

OF THE FOURTH SECTION.

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| 1. <i>Extends to interests created de novo.</i> | 16. <i>Crops sold with the land within fourth section.</i> |
| 5. <i>Exclusive right to vesture within it.</i> | 17. <i>Fixtures.</i> |
| 6. <i>So growing crops, as grass.</i> | 18, 32, 35. <i>Examination of the cases.</i> |
| 7. <i>Or growing poles, underwood, timber.</i> | 19, 35. <i>Anon. in Lord Raymond.</i> |
| 8. <i>But not wheat.</i> | 20. <i>Waddington v. Bristow.</i> |
| 9. <i>Nor trees sold as wood.</i> | 21, 34. <i>Crosby v. Wadsworth.</i> |
| 10. <i>Nor potatoes.</i> | 22, 34. <i>Emmerson v. Heelis.</i> |
| 11. <i>Nor turnips.</i> | 23. <i>Teall v. Auty.</i> |
| 12. <i>Nor hops.</i> | 24. <i>Parker v. Staniland.</i> |
| 13. <i>Nor crops between tenants.</i> | 25. <i>Warwick v. Bruce.</i> |
| 14. <i>But void sale, if executed, binding.</i> | 28. <i>Smith v. Surman.</i> |
| 15, 32, 36. <i>And sales of crops not within fourth section, are within the seventeenth.</i> | 29. <i>Scorell v. Boxall.</i> |
| | 30. <i>Carrington v. Roots.</i> |

31. *Sainsbury v. Matthews.*32. *Dunne v. Ferguson.*38. *Jones v. Flint.*39. *Purchaser of husbandry crops.*40. *Proper stamp.*41. *Mining company shares within the fourth section.*42. *Entire parol agreement for realty and personalty wholly void.*

1. THE fourth section of the Act extends as well to interests created *de novo* out of an estate, as to subsisting interests; therefore an agreement for an assignment of a lease will not be binding, unless made in writing (*a*).

2. If a man, having agreed *verbally* to buy an estate, agree by writing to sell the benefit of his contract to another who actually obtains a conveyance from the original seller, the transfer will be a sufficient consideration for the promise, and the first purchaser may recover the sum agreed to be paid for the transfer (*b*).

3. We have already seen that a void agreement may operate as a license countermandable (*c*).

4. In regard to the cases which have arisen upon the sale, by parol, of growing crops of grass, timber, underwood, potatoes, turnips, &c., I propose to state, in the abstract, the points of law which have been ruled, and then, in consequence of the importance *of the subject and the conflicting nature of the authorities, to examine fully the grounds upon which they were decided.

5. First, then, an actual interest agreed to be granted in land of course falls within the fourth section, and requires a written agreement. And if an agreement profess to give an exclusive right to the vesture of land during a given period, that is an interest concerning lands within the fourth section, and therefore, as we have seen, an agreement to sell a growing crop of mowing grass, to be mowed and made into hay by the purchaser, requires a written agreement (*d*) (1).

6. And even where such an exclusive right is not given as amounts to an interest in or concerning lands, yet an agreement to sell a crop which would not go as emblements to an executor,

(*a*) Anon. 1 Ventr. 361; see *Poultney v. Holmes*, 1 Str. 405.

(*b*) *Seaman v. Price*, 1 Ry. & Mood. 195.

(*c*) *Supra*, pl. 9.

(*d*) *Crosby v. Wadsworth*, 6 East, 602; see also *Carrington v. Roots*, 2 Mees. & Wels. 248. [*Griffith v. Puleston*, 14 Law J. Rep. N. S. Excheq. 33.]

(1) The case of *Crosby v. Wadsworth* was questioned in *Frear v. Hardenburgh*, 5 John. 272. See also *Mumford v. Whitney*, 15 Wendell, 386, 387; *Cutler v. Pope*, 13 Maine, 379, 380. In this last case, it was held, that grass already grown, and in a condition to be cut, may be sold by parol.

e. g. a crop of grass, cannot be deemed a chattel, and therefore can only be bound by a written contract (*e*).

7. Upon the same principle, a sale of growing poles (*f*), or of standing underwood (*g*), and of course therefore of timber, is within the fourth section, and a written contract of sale cannot be dispensed with.

8. But any crop which would be emblements, and might be taken in execution, for example, wheat, may be considered goods and chattels, and therefore not within the fourth section (*h*) (1).

9. So an agreement to sell standing timber, as trees, at so much a foot, which the proprietor had begun to cut down, and the purchaser bought them after two had been actually felled, was held to be a contract for the trees when they should be cut down and severed from the freehold, and consequently not to be within the fourth section (*i*); the timber was to be made a chattel by the seller (*k*). This, therefore, is an exception from the general case of selling standing timber (2).

(*e*) See *Evans v. Roberts*, 5 Barn. & Cress. 829; *Smith v. Surman*, 9 Barn. & Cress. 566.

396.
(*h*) See 3 Barn. & Cress. 364.

(*i*) *Smith v. Surman*, 9 Barn. & Cress. 561; 4 Man. & Ry. 455.

(*f*) *Teall v. Auty*, 4 Moo. 542.

561; 4 Man. & Ry. 455.

(*g*) *Scorell v. Boxall*, 1 You. & Jerv.

(*k*) See 1 Crompt. & Mees. 105.

(1) *Austin v. Sawyer*, 9 Cowen, 39; *Whipple v. Foot*, 2 John. 422; *Stewart v. Doughty*, 9 John. 112.

(2) In *Clafin v. Carpenter*, 4 Metcalf, 580, a contract for the sale of growing wood and timber, to be cut and removed by the purchaser, was held not to be a contract for the sale of any interest in or concerning lands, &c. within the Massachusetts statute of frauds. "Such a contract," said Mr. Justice Wilde, "is to be construed as passing an interest in the trees, when they are severed from the freehold, and not any interest in the land." So an oral agreement for the sale of mulberry trees growing in a nursery and raised to be sold and transplanted, to be delivered on the ground where they are growing, upon payment therefor being made, is not within the statute. *Whitmarsh v. Walker*, 1 Metcalf, 313. So an agreement, by an owner of land, that another may cut down the trees on the land, and peel them, and take the bark to his own use, is not within the statute. *Nettleton v. Sikes*, 8 Metcalf, 34. See *Ersine v. Plummer*, 7 Greenl. 447; *Mumford v. Whitney*, 15 Wendell, 380; *Adams v. Smith*, Breese, 221.

But in *Green v. Armstrong*, 1 Denio, 550, an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, was held to be a contract for the sale of an interest in land and to require a writing to support it. So in *Olmstead v. Niles*, 7 N. Hamp. 522, a sale of timber growing upon land with an agreement that the purchaser should have twenty-five years within which to take it off, was held to be a sale of an interest in land, and requiring a writing within the Stat. 1791, of New Hampshire. Mr. Justice Parker said: "It purports to be a transfer of an interest in land, as the plaintiff was to have the timber remain and grow upon the land, if he pleased, and take it off at such period within the twenty-five years as he should see fit." See *Putney v. Day*, 6 N. Hamp. 430. This appears to be the ground, upon which the case of *Crosby v. Wadsworth*, 6 East, 602, cited ante 99, turned, namely, that it was for the sale of a crop of growing grass, for the continued growth and maturity of which, a certain interest in the land was necessary. See *Parker v. Staniland*, 11 East, 362; *Cutler v. Pope*, 13 Maine, 380, Per *Weston C. J.*; *Griffiths v. Puleston*, 14 Law J. Rep. N. S. Excheq. 33.

10. And sales of potatoes in the ground, which would be emblements, do not fall within the fourth section ; whether sold at so much per sack, to be dug by the purchaser and taken away *immediately*, which is considered as a sale merely of the potatoes, and it is quite accidental if they derive any further advantage from being in the land, which is a mere warehouse for them, and the purchaser has only an accommodation, and no interest in the *soil (*l*) ; or whether they are then growing and sold at so much an acre, to be dug and carried away by the purchaser, without any time limited, which is considered still as a sale only of the potatoes, and whether at the time of sale they were covered with earth in a field or in a box, still it is a sale of a mere chattel (*m*) ; or whether the crop be in a growing state, and be sold by the cover, to be turned up by the seller (*n*) ; or the crop be sold at so much a sack, to be dug by the purchaser at the usual time, and to be then paid for, which is a contract to pay so much per sack for the potatoes when delivered (*o*).

11. So a crop of turnips, even recently sown is not within that section (*p*) (1).

12. Neither, it seems, would a parcel of growing hops fall within its provisions (*q*) (2).

13. And a parol agreement for the sale of crops may be good between an outgoing and incoming tenant, for there would be no sale of any interest in the land, for that would come from the landlord (*r*).

14. But although a parol agreement, which is within the fourth section, cannot be enforced before it is executed, yet if the agreement is executed by delivery and acceptance of the subject-matter of the sale, the seller may then recover (*s*).

15. And the consequence of the sale of such various crops, not

(*l*) *Parker v. Staniland*, 11 East, 362.

(*m*) *Warwick v. Bruce*, 2 Mau. & Selw. 205.

(*n*) *Evans v. Roberts*, 5 Barn. & Cress. 829 ; 8 Dowl. & Ry. 611 ; see 5 Barn. & Adol. 116 ; *Hallen v. Render*, 2 Crompt. & Mees. 266.

(*o*) *Sainsbury v. Matthews*, 4 Mees. & Wels. 343.

(*p*) *Dunne v. Ferguson*, 1 Hays, 541.

(*q*) *Waddington v. Bristow*, 2 Bos. & Pull. 452.

(*r*) See *Mayfield v. Wadsley*, 3 Barn. & Cress. 357 ; 5 Dowl. & Ry. 224 ; *Emmerson v. Heelis*, 2 Taunt. 38 *contra*, is overruled, see 5 Barn. & Cress. 832.

(*s*) *Teal v. Auty*, 4 Moo. 542.

(1) And the mere license to come upon the land for the purpose of gathering and securing the crop, which is incident to such a contract, is not a sale of a right concerning land within the meaning of the statute of frauds. Addison on Contracts, 92, 93 ; *Whitmarsh v. Walker*, 1 Metcalf, 313 ; *Jones v. Flint*, 10 Adol. & Ell. 753.

(2) But see *Rodwell v. Phillips*, 9 Mees. & W. 504.

carrying to the purchaser an interest in or concerning the land in which they grow or are planted, is, that they are, with reference to the time when the contract is completed, goods, wares, and merchandise, and therefore fall within the 17th section of the statute, which enacts, that no contract for the sale of goods, wares, and merchandise, for the price of 10*l.* or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum of the bargain be made and signed by the parties, to be charged by such contract or their agents thereunto lawfully authorized (*t*) (1). So that if the case fall within the fourth section, *there must be a contract in writing, and if it do not fall within it, yet there must still be a writing, unless there was earnest or part payment made, or part of the subject-matter of sale be accepted and received by the purchaser.

16. In *Lord Falmouth v. Thomas* (*u*), where a farm was agreed to be let by parol, and the tenant was to take the growing crops and pay for them, and also for the work, labor, materials in preparing the land for tillage, it was held that the case fell within the fourth section of the statute. The Court observed, that at the time when the contract was made the crops were growing upon the land, the tenant was to have had the land as well as the crops, and the work, labor, and materials were so incorporated with the land as to be inseparable from it. He would not have the benefit of the work, labor, and materials unless he had the land, and they were of opinion that the right to the crops and the benefit of the work, labor, and materials were both of them an interest in land.

17. But where (*x*) a tenant having a right to remove fixtures left them in the house, upon a verbal agreement with the landlord that the latter should take them at a valuation, the Court were quite satisfied that this was not a sale of any interest in land, and the judgment of the Court, and particularly of Mr. Justice Little-

(*t*) *Evans v. Roberts*, 5 Barn. & Cress. 829; *Smith v. Surman*, 9 Barn. & Cress. 566.

(*u*) 1 Crompt. & Mees. 89; see 1 Atk. 175; *Poulter v. Killingbeck*, 1 Bos. & Pull. 397; see 6 East, 613; *Mayfield v.*

Wadsley, 3 Barn. & Cress. 357.

(*x*) *Haller v. Render*, 1 Cr. Mees. & Ros. 266 (1834); *Lee v. Ridsen*, 7 Taunt. 188; *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76; *Clayton v. Burtonshaw*, 5 Barn. & Cress. 47.

(1) See *Whitmarsh v. Walker*, 1 Metcalf, 313.

dale, in *Evans v. Roberts*, upon the subject of growing crops, was, they said, an authority to the same effect (1).

18. I have thus endeavored to trace the law as it stands upon the authorities for the guidance of the student and practitioner. But the law on this head is not in a satisfactory state, and can hardly be considered as settled. The cases still require to be thoroughly examined by the Courts, with a view to place the law upon a proper foundation.

19. The first authority is a statement in Lord Raymond (y), that Treby, Chief Justice, reported to the other justices that it was a question before him, at a trial at *nisi prius* at Guildhall, whether the sale of timber *growing* upon the land ought to be in writing by the statute of frauds, or might be by parol. And he was of opinion, and gave the rule accordingly, that it might be by parol, because it was a bare chattel, and to this opinion Mr. Justice Powell agreed. And this in a late case was quoted by Mr. Justice *Holroyd as an authority, and as a case of an ordinary crop, for he added, in some cases, therefore crops growing upon the land may be considered as goods and chattels (z).

20. In *Waddington v. Bristow* (a) the question indirectly arose. An agreement was made for the purchase of all a man's growth of hops on his land at a certain rate per hundred weight, to be in pockets, and delivered at a place named, and the custom was where, as in this case, no time was specified for the delivery, it should be within a reasonable time after the hops are picked and dried; and the question was whether this was a sale of goods, wares, and merchandise, so as to exempt the written agreement from a stamp duty, under an exception in the then Stamp Act, and it was held that it was not. Lord Alvanley thought it an agreement for the sale of goods, wares, and merchandise, *and something more*. Mr. Justice Heath looked to the time at which the contract was made, and at that time the hops did not exist in the state of goods, wares, and merchandise. Mr. Justice Rooke considered the exemption to apply only to ordinary commercial transactions. Mr. Justice Chambre said this contract gave the vendee an interest in the whole produce of that part of the vendor's farm which con-

(y) Anon. 1 Lord Raym. 182; see Hob. 173, 1 Atk. 175.

(z) See 3 Barn. & Cress. 364.
(a) 2 Bos. & Pul. 452.

(1) *Bostwick v. Leach*, 3 Day, 476. So a parol contract for the sale of improvements on public lands is valid. *Zickafosse v. Hulick*, 1 Morris, 175. See *Frear v. Hardenburgh*, 5 John. 272; *Benedict v. Bebee*, 11 John. 145.

sists of hop grounds. If the vendor had grubbed up the hops, or had refused to gather or dry them, it would have been a breach of the contract. *Though he admitted that a contract for the sale of so many hops as twenty-two acres might produce, to be delivered at a distant day, might fall within the exception of the Act, notwithstanding the hops were not in the state of goods, wares, and merchandises at the time of the contract made, yet he could not think the present agreement within that exemption, since it gave an interest to the vendee in the produce of the vendor's land.*

Mr. Justice Bayley observed, in a later case, that *Chambre, J.*, was the only judge who intimated an opinion that the contract gave the vendee an interest in the land. He (*Bayley, J.*) concurred in opinion with the three judges who thought in that case that the hops were not goods, wares, and merchandise at the time of the contract. Mr. Justice Bayley therefore seems to have been of opinion that the sale of the hops was not an interest in land (although that, as he observed, was not the question there,) and yet they were not goods, wares, and merchandise—as Lord Alvanley said, something more than the latter,—and as we may add, something less than the former. The contract, it should be observed, was in November, for all the hops which should be grown in the ensuing year upon the particular lands. At that time the hops which were *the subject of the contract were not in existence, there was nothing but the root of the plant, and the purchaser was not to have that (*b*).

21. In the important case of *Crosby v. Wadsworth (c)*, there was a parol agreement to sell a standing crop of mowing grass then growing. The grass was to be mowed and made into hay by the purchaser, but no time was fixed at which the mowing was to be begun. Lord Ellenborough, in delivering the opinion of the Court, observed, that this could not be considered in any proper sense of the words as a sale of goods, wares, and merchandise, the crop being at the time of the bargain an unsevered portion of the freehold, and not movable goods or personal chattels; and he thought that the agreement, conferring as it professed to do an exclusive right to the vesture of the land during a limited time and for given purposes, was a contract or sale of an interest in, or at least an interest concerning lands (*1*).

(b) 5 Barn. & Cress. 834, 835.

(c) 6 East, 602 (1805).

(1) See ante 99 notes respecting this case.

22. In a later case, in the Common Pleas (*d*), growing turnips were sold in lots by auction, and the question arose upon the necessity of a written agreement. It was said *arguendo*, that the turnips were actually ripe and fit to be drawn, but there was no proof on this point. The Court simply observed, that as to this being an interest in land, they did not see how it could be distinguished from the case of hops decided in this court; but as they held that there was a sufficient signature to bind the purchaser, it seems hardly to have been necessary to decide the question we are now considering (*e*). Mr. Justice Bailey, in *Evans v. Roberts*, said, that he did not agree with Lord Chief Justice Mansfield, that there was no distinction between the hops in *Waddington v. Bristow*, and the growing turnips in the case of *Emmerson v. Heelis*, because he thought that in the latter case the growing turnips at the time of the contract were chattels (*f*).

23. In *Teall v. Auty* (*g*), A having bought a lot of growing timber, sold the poles to B, which A the seller cut and delivered to B the purchaser, who carried them away; and upon the authority of *Waddington v. Bristow*, *Emmerson v. Heelis*, and *Crosby v. Wadsworth*, the Court was of opinion that the agreement was originally for the purchase of an interest in land, for when it was made the poles were growing; but the poles having been actually taken away, the question ultimately turned upon the form of action.

*24. In *Parker v. Staniland* (*h*), where potatoes in the ground, and which had not been severed, were sold at so much a sack, to be dug by the purchaser, and taken away *immediately*, and which was held not to be a sale within the 4th section, Lord Ellenborough observed, that there was this difference between the cases, that in *Crosby v. Wadsworth* the contract was made while the grass was then in a *growing state*, which was afterwards to be mown at maturity, and made into hay; whereas there the contract was for the potatoes in a matured state of growth, which were then ready to be taken, and were agreed to be taken immediately. The contract was confined to the sale of potatoes and nothing else was in the contemplation of the parties. He was not disposed to extend the case of *Crosby v. Wadsworth* further, so as to bring such a contract as this within the statute of frauds,

(*d*) *Emmerson v. Heelis*, 2 Taunt. 38 (1809).

(*e*) See 5 Barn. & Cress. 833.

(*f*) 5 Barn. & Cress. 835.

(*g*) 4 Moo. 542 (1820); see Scorell Boxall, *infra*.

(*h*) 11 East, 362 (1809).

as passing an interest in land. Mr. Justice Bayley also referred the cases of *Crosby v. Wadsworth* and *Waddington v. Bristow* to the ground that the contracts were made for the *growing crops* of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were growing to maturity before they were gathered.

This places the doctrine upon an intelligible footing : it shows that there is nothing in the nature of the crop, whether hops, grass, potatoes, turnips, &c., but that the distinction relied upon was between *growing* crops and those which had arrived at maturity.

25. In the next case (i), where the sale was of a *growing* crop of potatoes at so much per acre, to be dug and carried away by the purchaser, but no time was appointed for that purpose, it was decided that the contract was not within the 4th section of the statute. But here the Court had to grapple with the difficulty, that the crop was a *growing* one. Lord Ellenborough observed, that if this had been a contract conferring an exclusive right to the land for a time, for the purpose or making a profit of the growing surface, it would be a contract for the sale of an interest in, or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth*. But here the contract was for the sale of potatoes at so much per acre; *the potatoes were the subject matter of sale*, and whether at the time of the sale they were covered with earth in the field or in a box, still it was the sale of a mere chattel.

In this case, therefore, the learned judge gave up his former *ground ; he looked at the contract as at the delivery of the crop, and as depending upon the question, whether merely the crop or an interest in the land was the subject matter of sale. There is no objection to the rule which he refers to as being established by *Crosby v. Wadsworth*.

26. In *Evans v. Roberts* (k), where it was held that a cover of potatoes in the ground, to be turned up by the seller, might be sold by parol, Mr. Justice Bayley took the distinction, that the contract was to buy the potatoes which a given quantity of land should produce, but not to have any right to the possession of the land. In *Crosby v. Wadsworth*, he observed, the buyer did acquire an interest in the land, for by the terms of the contract he was to mow the grass, and must therefore have had the possession

(i) *Warwick v. Bruce*, 2 Mau. & Selw. 205 (1813).

(k) 5 Barn. & Cress. 829 (1826).

of the land for the purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. And he took the distinction between growing grass, which does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*, and growing potatoes, which come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. He held therefore that this case did not fall, nor would a sale of a growing crop of the like kind fall within the 4th section.

Mr. Justice Holroyd, in the same case, thought, that although the vendee might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet he had not an interest in the land within the meaning of the statute: if even the buyer had had the right to dig up the potatoes, he would not have had an interest in the land, but a mere easement. And Mr. Justice Littledale was still more explicit. He was of opinion that a sale of the produce of the land, whether it be in a state of maturity or not, provided it be in actual existence at the time of the contract, is not a sale of lands, tenements or hereditaments, or any interest in or concerning them within the 4th section of the statute. The words lands, tenements, and hereditaments in that section, appeared to him to have been used by the legislature to denote a fee simple, and the words, any interest in or concerning them, were used to denote a chattel interest, or some interest less than a fee simple.

27. But in this case, Mr. Justice Bayley for the first time referred to the rule as to emblements, and gave an extrajudicial *opinion, that the contract was for the sale of goods, wares, and merchandises, within the meaning of the 17th section, but as the price was under 10*l.*, a written note or memorandum of the agreement was not necessary. Littledale, J., took the same view of the case, whilst Holroyd, J., simply held, that the case did not fall within the 4th section.

28. In *Smith v. Surman* (1), where the timber was in the course of being felled by the seller, and was sold at so much a foot, that was held not to fall within the 4th section. Mr. Justice Bayley said the contract was not for the growing trees, but for the timber, at so much per foot; *i. e.* the produce of the trees when they should be cut down and severed from the freehold. Mr. Justice Littledale

(1) *Supra*, p. 99. 9 Barn. & Cress. 561 (1829).

was of opinion that if the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. But after an elaborate consideration of the statute, the Court held that the contract fell within the 17th section, notwithstanding that work and labor was to be performed upon the trees by the seller, and that they were not converted into goods and chattels until after the contract.

29. And in *Scorell v. Boxall (m)*, where the question was whether trespass could be maintained by the purchaser by parol of underwood which was to be cut by him, Alexander, C. B., said that this parol contract was in direct violation of the statute of frauds. It seemed to him to be clearly a contract relating to the sale of an interest in land, which, by the statute, must be in writing. Mr. Baron Hullock said that it was incumbent on the purchaser to establish his right to an interest in the freehold, for trees are annexed to the freehold, are parcel of the inheritance, and pass with it. He referred to the distinction as to what are or are not emblements. There was, he said, a manifest distinction between crops and the subject matter of this contract. It is true that the dictum in *Lord Raymond* was opposed to this opinion; but it was to be remembered that, if it were law, the several modern cases which have been decided could never have arisen. He never before heard that dictum cited as an authority, and the only claim which it had, in his opinion, to that distinction, was the allusion to it by Mr. Justice Holroyd, in *Mayfield v. Wadsley*.

*30. Again, in *Carrington v. Roots (n)*, which, like *Crosby v. Wadsworth*, was a verbal agreement to sell a growing crop of grass at so much an acre, to be cleared by the purchaser before a day named, the Court said, that if this was a contract for the sale of goods, it was not disputed that it was void by the 17th section of the statute; and they held that if it was to be considered as a sale of an interest in land, it was not binding by virtue of the 4th section of the statute. But no distinction was taken as to the nature of the crop.

31. So where the sale was of potatoes then planted, at the price

(m) 1 You. & Jerv. 396 (1829); see (n) 2 Mees. & Wels. 248 (1837).
Teall v. Auty, supra, p. 99.

of 2s. per sack, the same to be dug by the purchaser at the usual time for digging the same, and to be paid for at that time, it was held to be a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the seller for that purpose, and could not come upon the land when he pleased. It gave no right to the land. If a tempest had destroyed the crop and there had been none to deliver, the loss would clearly have fallen on the seller. There was only a stipulation to pay so much per sack for the potatoes when delivered; it was only a contract for goods to be sold and delivered (o).

32. In a case where a crop of turnips recently sown was sold for 10*l.*, Joy, C. B., in Ireland, observed that, at common law, growing crops were uniformly held to be *goods*. The statute of frauds took them as it found them, and provided for lands and goods according as they were so esteemed before its enactment. If before the statute a growing crop had been held to be an interest in lands, it would come within the 2d section of the Act (p), but if it were only goods and chattels, then it came within the 13th section. And the Court thought that growing crops had all the consequences of chattels, and were, like them, liable to be taken in execution, and therefore the contract was a valid one (q).

33. In the result, therefore, where the crops are considered as chattels, there must be a note or memorandum in writing of the agreement under the 17th section, unless the value be under 10*l.* or there was earnest or part payment, or part of the subject matter of sale was received and accepted by the purchaser.

34. It remains to be considered in which of the cases the true rule has been adopted. It is to be regretted that they are so conflicting, and still more that many of them should have been decided *upon slight distinctions, which in later cases it was found necessary to abandon.

35. As to the leading case of *Crosby v. Wadsworth*, which Lord Ellenborough professed his own unwillingness to carry further, there is much in the judgment open to observation; but the question is, whether the Court came to the right conclusion, that the agreement did confer an exclusive right to the vesture of the land during a limited period and for a given purpose. If that was the true construction, the agreement no doubt required a writing to

(o) *Sainsbury v. Matthews*, 4 Mees. & Wels. 343 (1838); nothing was said in regard to the 17th section, on account,

I suppose, of the value.

(p) Irish Act, 7 Will. 3, c. 12.

(q) *Dunne v. Ferguson*, 1 Hayes, 541.

give validity to it. But there appears to have been no solid distinction between that and many of the later cases, in which a power to enter and gather the crop was incidentally given. The cases of potatoes and turnips, for example, are stronger cases, more particularly the former, as the ground is disturbed, and the whole produce is carried off. If *Crosby v. Wadsworth* was, as it appears to have been, a mere sale of a growing crop, to be cut and carried by the purchaser, the decision could not now be supported on this principle, consistently with the other authorities, and the case of *Emmerson v. Heelis* may safely be considered as overruled (*r*).

36. But then it will be urged that *Crosby v. Wadsworth* may be supported on the other ground, viz. the doctrine of emblements, as there the crop was grass spontaneously produced from year to year. But the Chief Justice took no such distinction, nor did he refer to any such doctrine in its support in the later cases in which he referred to that case; nor was that distinction taken in *Carrington v. Roots*, which, like *Crosby v. Wadsworth*, was the sale of a growing crop of grass. This distinction would require a written agreement under the 4th section for the sale of a crop of grass, whilst a crop of clover would fall within the 17th section. Indeed, many difficulties would arise: it would be doubted, for example, which section would apply to a growing crop of apples (*s*); and part of a crop of clover might fall within the 17th section and the residue within the 4th (*t*); and the different sorts of fixtures would lead to many distinctions (*u*). And where cases are within the 4th section, still there would be exceptions, according to the distinction in *Smith v. Surman*, for that case establishes that even a permanent crop may, although growing, be sold as a chattel. But the learned reader may probably doubt whether the doctrine of emblements has been properly applied to this case. Clearly, *the framers of the statute of frauds had no such distinction in view, nor was it adopted by the Courts until recently. It is a new construction of this old statute, and few things are less to be desired. The right to take a crop in execution, or its character in case of death as an emblement, does not determine the question upon the statute. The crop, whatever be its nature, is growing or planted and in the ground, and the true question was agitated in the early

(*r*) See now *Jones v. Flint*, 10 Adol. & Ell. 759.

(*s*) See 5 Barn. & Adol. 116.

(*t*) See *Graves v. Weld*, 5 Barn. & Adol. 105.

(*u*) See 7 Taunt. 191.

cases, viz. whether the sale of the crop was an interest in or concerning land, and it was held that it was not, and it would be better it is submitted to abide by that rule, than, in every case of a permanent crop, to be considering whether it be sold as a growing crop or as a chattel. The point ruled by Treby, C. J., and agreed to by Powel, J., and quoted as an authority by Holroyd, J., and never denied to be such till the case of *Scorell v. Boxall*, ought not to have been lightly overruled. It would be difficult to support *Teall v. Auty* as an authority, for there the poles were already a chattel in the hands of the original buyer and sub-seller, and he was to cut and deliver them at a given price: that case is in direct opposition to the case of *Smith v. Surman*. If the late cases are to be followed, it will be found necessary to have the rule as to fixtures reconsidered.

37. If it should ultimately be held that the 4th section does not apply to any of these cases, unless an exclusive interest in the land is given to the purchaser, the only other question will be, whether any of these crops fall within the 17th section. The opinion in *Waddington v. Bristow*, as we have seen, was, that hops (which are emblements) were goods, wares, and merchandise, *and something more*; and in *Crosby v. Wadsworth*, the case of the growing crop of grass (which is not an emblement), Lord Ellenborough said, that, in the outset, he felt himself warranted in laying wholly out of the case, the provision contained in the 17th section, as not applicable to the subject matter of that agreement, which could not be considered in any proper sense of the words as a sale of goods, wares, or merchandise, the crop being at the time of the bargain (and with reference to which he agreed with Mr. Justice Heath in *Waddington v. Bristow*, that the subject matter must be taken) an unsevered portion of the freehold, and not movable goods or personal chattels (*x*). And he made this observation, not with reference to any supposed distinction on this point between natural and artificial grasses, but generally with reference to an unsevered crop in the ground. And this seems to be the true distinction; *but as the law stands, every sale of crops in the ground should be made by a written agreement, unless they are under the value of 10*l.*, and are clearly sold as movable goods.

38. In a later case (*y*), where the sale was by parol of the crop of corn on the land, and the profit of the stubble afterwards, and

(*x*) 6 East, 610.

(*y*) *Jones v. Flint*, 10 Adol. & Ell. 753.

the seller was to have liberty for his cattle to run with the purchaser's, and the latter was also to have some potatoes growing on the land, and whatever long grass was in the fields; the purchaser was to harvest the corn and dig up the potatoes, and the seller was to pay the tithe. The question arose only on the 4th section, and it was held that this was not a sale within it. The crops were not ripe, though nearly so, when sold. The Court held that all the crops but the long grass were *fructus industriales*, as such chattels, and although not ripe, yet the sale, from their original character, was a contract merely for the sale of goods and chattels. An easement of the right to enter the land for the purpose of harvesting and carrying away the crops, was all that was intended to be granted to the purchaser. As to the grass, the seller was to pay the tithe, and reserved to himself the right of turning his own cattle into the fields, and the more reasonable construction of the contract was, that the possession of the field still remained with the owner after the harvesting, as before, and it was more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by him whose interest at the best was of so very limited a nature. And in this way the Court escaped out of the authority of *Crosby v. Wadsworth*. But the Court said that the long grass was the natural produce of the land, not distinguishable from the land itself, in legal contemplation, until actual severance; and according to *Crosby v. Wadsworth*, if the parties in this case intended a sale and purchase of the grass, to be mowed or fed by the buyer, *both on principle and authority* the objection must prevail. But this we have seen they held not to be the case. And they doubted whether anything that could be called a crop of grass was in the ground, or in the contemplation of the parties at all. Of course it was the spontaneous production of the earth during and after the corn crop. But in this case the Court avoided impeaching the principle of *Crosby v. Wadsworth*.

39. Before we quit the subject of crops, we may observe, that any purchaser of the crops of any person engaged or employed in husbandry, on any lands let to farm, must not take, use, and dispose of any hay, straw, grass, turnips or other roots, or other produce, *or any manure or dressings intended for such lands, and being thereon, in any other manner or for any other purpose than the seller ought to have taken, used, or disposed of the same, if no such sale had been made (z).

40. We may close the subject of a sale of growing crops by observing, that an agreement for such a sale, carrying the right of possession for a limited time at a gross sum not exceeding 50*l.*, requires a 1*l.* stamp as a conveyance within the description in the Stamp Act (*a*).

41. In a case in Ireland (*b*), a sale of a share in a mining company was held, by the Court of King's Bench, to be within the statute. The Chief Justice observed, that the mining company were engaged in a partnership in interests, in or concerning lands, tenements, or hereditaments. The nature of mining implies at least a right to open the ground, and keep it open, and such right to the land for a limited time and purpose as induced the Court, in *Crosby v. Wadsworth* (*c*), to hold a contract for the sale of a growing crop to be within the statute. But the evidence given upon the trial, by the secretary of the company, put this part of the case out of doubt. He stated, that the company had many mines at work in different parts of Ireland; that they had purchased some and rented others, and that they had erected steam-engines, and smelting-houses, and built workmen's houses. Now, the shares of this company were transferable; and what does a purchaser of one of them acquire, and what would he be entitled to on the dissolution of the company? Why, a share in those houses and interests in lands which the company had acquired.

42. We may close these observations by observing, that if an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute, and void, it cannot be supported as to the personal property which was sold with it (*d*) (1), and if the agreement be a valid one, yet no property in the goods vests in the purchaser before the contract is executed (*e*).

(*a*) *Cattle v. Gamble*, 5 Bing. N. C. 46.

(*b*) *Boyce v. Green, Batty*, 608.

(*c*) 6 East, 602.

(*d*) *Cooke v. Tombs*, 2 Aust. 420; *Lea v. Barber*, *ib.* 425, cited. See *Chater v. Beckett*, 8 Term Rep. 201; and see *Neal v. Viney*, 1 Camp. Ca. 471; *Corder v.*

Drakeford, 3 Taunt. 382; *Mayfield v. Wadsley*, 3 Barn. & Cress. 357; 5 Dowl. & R. 224; *Lord Falmouth v. Thomas*, 1 Crompt. & Mees. 89; *Mechelen v. Wallace*, 2 Nev. & Per. 224; 7 Adol. & Ell. 49.

(*e*) *Lanyon v. Toogood*, 13 Mees. & Wels. 27.

(1) *Thayer v. Rock*, 13 Wendell, 53. If part of an entire promise be void by the statute of frauds, the whole is void. *Loomis v. Newhall*, 15 Pick. 159.

If part of an entire promise be void by *Van Alstyne v. Wimple*, 5 Cowen, 162;

*SECTION III.

OF THE FORM AND SIGNATURE OF THE AGREEMENT.

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| <p>2. <i>Signature by party to be charged sufficient.</i></p> <p>5. <i>How the other party may be bound.</i></p> <p>8. <i>Receipts and letters sufficient.</i></p> <p>9. <i>Stamping letters.</i></p> <p>11. <i>Offers in writing binding.</i></p> <p>13. <i>Unless there be fraud.</i></p> <p>14, 39. <i>Simple acceptance binding.</i></p> <p>15. <i>Offer may be retracted before acceptance.</i></p> <p>16. <i>Where special acceptance necessary.</i></p> <p>17. <i>Receipt or letter must specify all the terms.</i></p> <p>24. <i>Trifling omission fatal.</i></p> <p>25. <i>Omissions supplied by reference to other writings.</i></p> <p>31. <i>What amounts to an adoption of an unsigned agreement.</i></p> | <p>32. <i>Insufficient references to other papers.</i></p> <p>34. <i>Want of signature not supplied by letter abandoning an agreement.</i></p> <p>35. <i>Reference to different contract insufficient.</i></p> <p>36. <i>Auctioneer's receipt, entry, &c., binding.</i></p> <p>38. <i>Letters to third persons binding.</i></p> <p>40. <i>Bonds of reference to surveyor.</i></p> <p>41. <i>Rent rolls, abstracts, &c., not agreements.</i></p> <p>44. <i>Nor draft of conveyance.</i></p> <p>45. <i>Valid agreement binding, though sent as instructions.</i></p> <p>47. <i>Pleading letters.</i></p> |
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1. We may now consider, first, what is a sufficient agreement ; 2dly, what is a sufficient signature by the party or his agent ; and 3dly, who will be deemed an agent lawfully authorized.

2. The statute requires the writing to be signed only by the person to be charged ; and therefore, if a bill be brought against a person who signed an agreement, he will be bound by it, although the other party did not sign it, as the agreement is signed by the person to be charged (a) (1). This point has been established by

(a) *Hatton v. Gray*, 2 Ch. Ca. 164 ; *Cotton v. Lee*, 2 Bro. C. C. 564 ; *Coleman v. Upcot*, 5 Vin. Abr. 527. pl. 17 ; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44 ; *Seton v. Slade*, 7 Ves. jun. 265 ; 2 Jac. & Walk. 428 ; *Fowle v. Freeman*, MS. ; 9 Ves. jun. 355, S. C. See 1 Scho. & Lef. 20 ; and 11 Ves. jun. 592 ; *Western v. Russell*, 3 Ves. & Bea. 187 ; and see *Wain v. Walters*, 5 East, 10 ; *Egerton v. Mat-*

thews, 6 East, 307, which do not impeach this doctrine : see particularly 5 East, 16 ; and *Allen v. Bennet*, 3 Taunt. 169. As to *Wain v. Walters*, see *Stadt v. Lill*, 9 East, 348 ; 1 Camp. Ca. 242 ; *Ex parte Minet*, 14 Ves. jun. 189 ; *Ex parte Gardom*, 15 Ves. jun. 286 ; *Bateman v. Phillips*, 15 East, 272 ; *Sanders v. Wakefield*, 4 Barn. & Ald. 595 ; *Jenkins v. Reynolds*, 3 Brod. & Bing. 14 ; 6 Man. 86.

(1) 2 Kent, (6th ed.) 510 and note ; *Shirley v. Shirley*, 7 Blackf. 452 ; *Higdon v. Thomas*, 1 Harr. & Gill, 139 ; *Getchell v. Jewett*, 4 Greenl. 350 ; *Barstow v.*

the authority of Lord Keeper North, Lord Keeper Wright, Lord Hardwicke, C. B. Smith, and Bathurst and Aston, Justices, when Lords Commissioners, Lord Thurlow, Lord Eldon, and Sir Wm. *Grant. The Legislature has expressly said, that the agreement shall be binding *if signed by the party to be charged*; and as Lord Hardwicke has observed, the word *party* in the statute is not to be construed *party* as to a deed, but person in general (*b*); but there have been instances in which the want of the signature to the agreement by the party seeking to enforce it, has been deemed a badge of fraud (*c*); but, perhaps, the transaction ought not to be viewed in that light, unless the other party called on the party who had not signed to execute it, in which case a refusal to sign might be held to operate as a repudiation of the contract (*d*) (I).

3. In a late case, Lord C. J. Mansfield observed, that *in equity* a contract signed by one party would be enforced, *and it was not clear that it was different at law* (*e*). The rule in equity, it is conceived, is founded simply on the words of the statute, which must be equally binding on the courts of law. There is not an objection which can be made to the rule as applicable to an action at law which will not apply with equal force to a suit in equity. In a later case, accordingly, upon the 17 section, the same learned judge observed, that every one knows it is the daily practice of the Court of Chancery to establish contracts signed by one person only, and yet a court of equity can no more dispense with the sta-

(b) See 3 Atk. 503.

(c) See O'Rourke v. Percival, 2 Ball & Beatty, 58.

(d) See 2 Ball & Beatty, 371; and Martin v. Mitchell, 3 Swanst. 428.

(e) Bowen v. Morris, 2 Taunt. 374.

(I) The author's anxiety to place the law upon a safer footing, induced him to bring in a bill to amend the statute of frauds. He had not an opportunity of pressing it through the House of Commons; but as such things are not accessible, and the law will probably be altered, it has been thought right to print the bill in the Appendix, No. 8.

Gray, 3 Greenl. 109; McCrea v. Purnmort, 16 Wendell, 460; 1 Greenl. Ev. § 268; Clason v. Bailey, 14 John. 487; Douglass v. Spears, 2 Nott & Mc. 267; Davis v. Shields, 26 Wendell, 341; 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, ch. 3, § 10, 4 vol. 52, and note; Lent v. Padelford, 10 Mass. 230; Hawkins v. Chase, 19 Pick. 502.

But under the Rev. Stat. of New York, a contract for the sale of land is not binding upon either party, unless the agreement is in writing, and is subscribed by the party by whom the sale is made, or by his duly authorized agent. And it is not sufficient to charge the vendee upon such contract, that the agreement was subscribed by him or by his agent. Champlin v. Parish, 11 Paige, 405; National Fire Ins. Co. v. Loomis, 11 Paige, 431; Baptist Church in Ithaca v. Bigelow, 16 Wendell, 28, 30; Cammeyer v. United German Lutheran Churches, 2 Sandf. Ch. 186. And it is not sufficient to the validity of such contract, that it is in the hand-writing of the vendor; it must be actually subscribed. Champlin v. Parish, 11 Paige, 405.

tute of frauds than a court of law can (*f*). Lord Eldon has observed, that equity has not upon these points gone further than courts of law: what is the construction of the statute, what within the legal intent of it will amount to a signing, being the same questions in equity as at law. Upon that point, equity professing to follow the law, if a new question should arise, he said that he would rather send a case to a court of law (*g*). In a still later case at *nisi prius*, where the purchaser only had signed, Lord Tenterden said it was the duty of the auctioneer to sign, and he had often had occasion to lament they do not do so. What a court of equity would do in the case he could not possibly say. He declined deciding the point according to his opinion, as the counsel would *not undertake to carry the same forward on a bill of exceptions (*h*).

4. This point was again agitated in the late case of *Laythoarp v. Bryant* (*i*), and it was decided that the agreement was binding upon the party who signed it. This puts the point at rest. The Court thought there was no reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature. The word agreement was satisfied if the writing states the subject matter of the contract, the consideration, and is signed by the party to be charged. The statute requires that it shall be signed by the party to be charged, and it was not intended to impose on the vendor the burthen of the proof of some other paper in the hands of the opposite party, and which the vendor may have no means of producing, for it often happens that each party delivers to the other the part signed by himself. A common case is where an agreement arises out of a correspondence: it often happens that a party is unable to give evidence of his own letter, and he is not to be defeated because he cannot produce a formal agreement signed by both the parties to the contract.

5. The cases establish this further principle, that where a contract in writing or note exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them, although it is not written with any view of binding the writer by the contract (*k*).

(*f*) *Allen v. Bennet*, 3 Taunt. 176.

(*g*) 18 Ves. jun. 183.

(*h*) *Wheeler v. Collier*, 1 Mood. & Mal. 123.

(*i*) 2 Bing. N. C. 735; *Field v. Boland*, 1 Drury & Walsh, 37.

(*k*) *Dobell v. Hutchinson*, 3 Adol. & Ell. 355; *vide infra*.

6. But although the agreement must be signed, yet it need not be so averred in a bill for a specific performance; for the writing, unless signed, would not be an agreement, and as the allegation in the bill of course is that there is an agreement in writing, signature must be presumed until the contrary is shown (l).

7. If a written agreement has been in part executed, it seems that an agreement subsequently entered into between the parties, and reduced into writing, will bind them both, if signed by one of them (m) (1).

8. A receipt for the purchase-money may constitute an agreement in writing within the statute (n) (2); and it has frequently been decided, that a note or letter will be a sufficient agreement to take *a case out of the statute (o) (3); but every agreement must be stamped before it can be read (p); and, as this ought to be done, the Court will permit the cause to stand over to get the agreement stamped, and will assist either party in obtaining it for that purpose.

9. Thus, in *Fowle v. Freeman* (q), the agreement was sent by the

(l) *Rist v. Hobson*, 1 Sim. & Stu. 543.

(m) *Owen v. Davies*, 1 Ves. 82.

(n) *Coles v. Trecothick*, 9 Ves. jun. 234; *Blagden v. Bradbear*, 12 Ves. jun. 466.

(o) *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Buckhouse v. Crossby*, 2 Eq. Ca. Abr. 32, pl. 44. As to contract by letters in cases not within the statute, see Rich-

ards v. Hayward, 2 Mann. & Grang. 574.

(p) *Ford v. Compton*; *Hearne v. James* 2 Bro. C. C. 32, 309.

(q) *Rolls*, March 8, 1804, MS. 9 Ves. jun. 351, S. C. but not reported as to this point. See *infra*, *Clarke v. Terrel*, 1 Smith's Rep. 399; *Coles v. Trecothick*, 9 Ves. jun. 234.

(1) See *Gale v. Nixon*, 6 Cowen, 445.

(2) *Barickman v. Kuykendall*, 6 Blackf. 21. But to have this effect the receipt must show either on its face, or by reference to some other document, every material part of a valid contract on the subject, *ib.*; *Kay v. Curd*, 6 B. Monroe, 100; *Ellis v. Deadman*, 4 Bibb, 466.

A receipt, in the words, "Received of A. B. \$—, in part pay for a lot he bought of me in the town of V.," &c. and signed, is not a sufficient statement of the terms of the contract. *Kay v. Curd*, 6 B. Monroe, 100. But a receipt stating, that the vendor had received of the vendee a certain sum, "being on account of a plantation on the Cypress, sold to him this day for \$2,200, payable in different installments, as per agreement," was held sufficient compliance with the statute of frauds. *Cosack v. Descondres*, 1 M'Cord, 425.

(3) It is not necessary, that the whole agreement should be comprised in a single instrument or document, nor that it should be drawn up in any particular form. It is sufficient, if the contract can be plainly made out, in all its terms, from any writings of the party, or even from his correspondence. But it must all be collected from the writings; oral testimony not being admissible to supply any defects or omissions in the written evidence. 1 Greenl. Ev. § 268; 2 Cruise Dig. by Mr. Greenleaf, 4th. 32 ch. 3 § 3 and note, 4 vol. 51 note; 2 Kent, (6th ed.) 510, 511; *Ide v. Stanton*, 15 Vermont, 685; *Adams v. M'Millan*, 7 Porter, 73; *Bailey v. Ogden*, 3 John. 399; *Abeel v. Radeliff*, 13 John. 297; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273; *Atwood v. Cobb*, 16 Pick. 230, Per Shaw C. J.; *Parker v. Bodley*, 4 Bibb, 102; Baptist Church in Ithaca v. Bigelow, 16 Wendell, 28; *Merritt v. Clason*, 12 John. 102. And while the controversy is between the original parties, all their contemporaneous writings, relating to the same sub-

vendor to his attorney, with a letter written at the bottom, directing him to prepare a technical agreement. The vendor afterwards refused to perform the contract, and the attorney would not deliver the agreement to the purchaser for the purpose of getting it stamped, contending that it was a private letter to him; but the Court, on motion, ordered it to be delivered to the purchaser for that purpose (1).

10. But if the agreement is admitted by the answer, so as to dispense with the necessity of proving it, the office-copy of the bill, or, if the defendant refuse to produce it, the record itself, may be read in support of the plaintiff's case, and need not be stamped, nor can the fact of the agreement not being stamped be taken advantage of (r).

11. If, upon a treaty for sale of an estate, the owner writes a letter to the person wishing to buy it, stating, that if he parts with the estate it shall be on such and such terms (specifying them); and such person, upon receipt of the letter, or within a reasonable time after the offer is made (s), accept the terms mentioned in it, the owner will be compelled to perform the contract in *specie* (t).

12. So if a man (being in company) make offers of a bargain, and then write them down and sign them; and another person take them up and prefer his bill, that will be a sufficient agreement to take the case out of the statute (u) (2).

13. But if it appear that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, in case of an action, it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid

(r) *Hudleston v. Briscoe*, 11 Ves. jun. pl. 87. See *Gaskarth v. Lord Lowther*, 12 Ves. jun. 107.

(s) See 3 Mer. 454; 1 Coll. N. C. 310.

(u) S. C. *per* Lord Chancellor.

(t) *Coleman v. Upcott*, 5 Vin. Abr. 527,

jeet matter, are admissible in evidence. 2 Cruise Dig. by Mr. Greenleaf, Tit. 32. ch. 3 § 3 in note; *Freeport v. Bartol*, 3 Greenl. 340.

An agreement in writing, to refer a matter in dispute respecting a parol sale of lands, to arbitrators, if in other respects certain, constitutes a sufficient memorandum of agreement to bind the parties to a specific performance of their award that the lands shall be conveyed. *Brown v. Burkemeyer*, 9 Dana, 161.

(1) But a parol agreement for the sale of land, will not be specifically enforced against the heir of the vendor, though the vendor had given instructions in writing, stating the terms, to an attorney, to draw the deed of conveyance. *Givens v. Calder*, 2 Desaus. 172. But see *Finucane v. Kearney*, 1 Freeman, Ch. 65, 69.

(2) So where an agent had agreed, by parol, to bid for his principal, at a sheriff's sale, for certain real estate, and who took the titles in his own name, the case will be taken out of the statute of frauds, by an account made out and signed by him, charging his principal with the purchase-money. *Denton v. M'Kenzie*, 1 Desaus. 289.

agreement on his part, or as only containing proposals in writing, *subject to future revision (*x*); and if the aid of equity be sought, these circumstances would have equal weight with the Court. So in every case it must be considered, whether the note or correspondence import a concluded agreement; if it amount merely to treaty, it will not sustain an action or suit (*y*).

14. The letters will not constitute an agreement unless the answer to the offer is a simple acceptance, without the introduction of any new term (*z*) (I) (1). And if the offer be in effect rejected by the tender of a less sum, the offer is at an end and cannot be revived by a simple acceptance of it (*a*).

15. And although a given time be named in the offer for the acceptance of it, yet it may be retracted at any time before it is actually accepted (*b*).

16. And where a letter or other writing do not in itself evidence all the terms of the engagement by which the person signing it consents to be bound, but it requires from the other party not a simple assent to the terms stated, but a special acceptance which is to supply a farther term of the agreement; there it is obvious that such special acceptance must be expressed in writing, for otherwise the whole agreement will not be in writing, within the statute of frauds (*c*).

17. The note or writing must specify the terms of the agreement, for otherwise all the danger of perjury which the statute intended to guard against would be let in (2).

18. Thus, upon the sale of nine houses which were in mortgage,

(*x*) See *Knight v. Crookford*, 1 Esp. Ca. 189.

(*y*) *Huddleston v. Briscoe*, 11 Ves. jun. 583; *Stratford v. Bosworth*, 2 Ves. & Bea. 341; *Ogilvie v. Foljambe*, 3 Mer. 53.

(*z*) *Holland v. Eyre*, 2 Sim. & Stu. 194; *Routledge v. Grant*, 4 Bing. 653; 1 Moore & Payne, 717; *Smith v. Surman*,

9 Barn. & Cress. 561; *Thomas v. Blackman*, 1 Coll. 301.

(*a*) *Hyde v. Wrench*, 3 Beav. 334.

(*b*) *Routledge v. Grant*, *ubi sup.*; *Thornbury v. Beville*, 1 You. & Coll. C. C. 554.

(*c*) *Boys v. Ayerst*, 6 Madd. 316.

(I) Where there are divers letters, it is sufficient to stamp one with the duty of 1*l.* 15*s.*, although in the whole they contain twice the number of words allowed or upwards: 55 Geo. 3, c. 184. Sch. Agreement.

(1) *Eliason v. Henshaw*, 4 Wheaton, 225, 228.

(2) *Smith v. Arnold*, 5 Mason, 414; *Idc v. Stanton*, 15 Vermont, 685; *Nichols v. Johnson*, 10 Conn. 192; *Meadows v. Meadows*, 3 M'Cord, 458; *Adams v. M'Millan*, 7 Porter, 73; *Pipkin v. James*, 1 Humph. 325; *Kay v. Curd*, 6 B. Monroe, 100; *Abel v. Radcliff*, 13 John. 297; *Dodge v. Lean*, *ib.* 508.

The agreement must in some way show who are the parties to the contract. *Sherburne v. Shaw*, 1 N. Hamp. 157; *Nichols v. Johnson*, 10 Conn. 192; *Webster v. Ela*, 5 N. Hamp. 540; *Anderson v. Harold*, 10 Ohio, 397.

the vendor wrote a letter to the mortgagee to this effect "Mr. Leonard, pray deliver my writings to the bearer, I having disposed of them. Am, &c." The vendor afterwards refused to perform the contract, and pleaded the statute of frauds to a bill filed by the purchaser for a specific performance, and the plea was allowed; because it ought to be such an agreement as specified the terms thereof, which this did not though it was signed by the party; for this mentioned not the sum that was to be paid, nor the number of *houses that were to be disposed of; whether all, or some, or how many; nor to whom they were to be disposed of; neither did this letter mention whether they were disposed of by way of sale or assignment of lease (*d*): but where the property is described generally as "Mr. O.'s house," parol evidence has always been admitted to show to what house the treaty related (*e*) (1).

19. So where the memorandum was in these words, "Sold 100 Mining Purdy's, at 17s. 6d., J. Greene," it was held insufficient, as the names of both the buyer and the seller were not mentioned in it (*f*) (2).

20. So where (*g*), upon a parol agreement, the vendor sent a letter to the purchaser, informing him that, at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that he (the purchaser) should not have the estate, unless he would give a larger price; Lord Hardwicke held, that the letter could not be sufficient evidence of the agreement, the terms of it not being mentioned in the agreement itself.

21. So in a recent case, where an auctioneer's receipt for the deposit was attempted to be set up as an agreement, the Master of

(*d*) *Seagood v. Meale*, Prec. Cha. 560; 437; 9 Dowl. & Ry. 497; *Graham v. Rose v. Cunynghame*, 11 Ves. jun. 550; *Musson*, 7 Scott, 769; all five cases on the 17th section.

(*e*) *Ogilvie v. Foljambe*, 3 Mer. 53; see *Bleakley v. Smith*, 11 Sim. 150.

(*f*) *Boyce v. Green, Batty*, 608.

(*g*) *Clerk v. Wright*, 1 Atk. 12; and see *Clinan v. Cooke*, 1 Scho. & Lef. 22.

(1) Where the subject of sale was described in the memorandum as "B.'s right in C.'s estate," the description was held to be sufficiently certain. *Nichols v. Johnson*, 10 Conn. 192.

The following memorandum was held sufficient to satisfy the statute, namely,—
 "For C. Shultz, May 27th, at Auction, Corner of Lower Market and Main Street, fifteen feet front, by forty-six feet deep; Chesseldine. Terms of sale—one quarter cash, balance in twelve, eighteen and twenty-four months, with interest secured by mortgage, J. J. Wright, auctioneer." *Pugh v. Chesseldine*, 11 Ohio, 109. See *Bleakley v. Smith*, 11 Sim. 150.

(2) *Nichols v. Johnson*, 10 Conn. 192; *Sherburne v. Shaw*, 1 N. Hamp. 157; *Webster v. Ela*, 5 N. Hamp. 540; *Anderson v. Harold*, 10 Ohio, 399.

the Rolls rejected it, because it did not state the price to be paid for the estate; and it could not be collected from the amount of the deposit, as it did not appear what proportion it bore to the price (*h*) (1).

(*h*) *Blayden v. Bradbear*, 12 Ves. jun. Cress. 583; 8 Dowl. & Ry. 343. 466; see *Elmore v. Kingskote*, 5 Barn. &

(1) *Ide v. Stanton*, 15 Vermont, 685; *Meadows v. Meadows*, 3 M'Cord, 458; *Adams v. M'Millan*, 7 Porter, 73. See *Johnson v. Ronald*, 4 Munf. 77.

The following memorandum, namely, "It is agreed that B. is to have the refusal of a certain farm situated, &c. which was bought by me for the sum of 1940 dollars upon his complying with certain conditions from the first day of April next, which conditions the aforesaid B. has complied with," was held sufficiently to indicate the price of the land to be conveyed. *Bird v. Richardson*, 8 Pick. 252. In *Atwood v. Cobb*, 16 Pick. 227, the writing signed by both parties was as follows: "This certifies, that I have sold to N. A." the plaintiff, "about five acres of land, more or less, being the same which I bought of him, in consideration of the same sum which I paid him for the same, with interest from the time I purchased the same, till I paid for it (supposed about six months,) with the expense of the deed, also the taxes for one year." This was held not to be void on the ground that the price to be paid for the land was not set forth therein with sufficient certainty; nor on the ground of uncertainty as to the time when the contract was to be executed. Mr. Chief Justice Shaw, said; "It is quite impossible to go through the cases upon this branch of the statute of frauds; it is sufficient to say, in general terms, that under this provision," respecting a written agreement, memorandum or note, on a sale of lands, "the contract or memorandum must express the substance of the contract, with reasonable certainty, either by its own terms or by reference to some other deed, record, or other matter from which it can be ascertained with like reasonable certainty. The statute is intended as a shield; no particular forms are required, and it looks at the substance of the contract. It requires a note or memorandum of the contract, not a detail of all its particulars. The court are of opinion, that the memorandum, loose and unskilful as it is, answers these conditions. It refers definitely to facts, familiarly known to the parties, and in all probability well understood by them; the estate is well described as the same estate, which Atwood" the plaintiff "had before sold to Cobb" the defendant. "The principal uncertainty is as to the price to be paid; for having considered this as an executory contract, as an agreement for a sale, to be made afterwards, it follows as a necessary consequence, that when it farther states the consideration, the payment of that consideration is to be further understood, and it has the same meaning as if the words were, in consideration of the same sum to be thereupon paid to me therefor, which I paid him. This fixes the sum, together with some slight addition of interest to be computed for a time specified, and the expense of a deed. The latter is a trifle, may be considered as very nearly settled by usage, and at all events, cannot be deemed to be of the substance of the contract. As the amount paid for an estate, is usually determined by the consideration expressed in the deed of conveyance, or by some receipt or memorandum, it is impossible to pronounce this contract void under the statute, because it does not express with sufficient certainty the price to be paid for the estate."

By express provision in Massachusetts the memorandum required by the statute of frauds need not contain a statement of the consideration. Rev. Stat. of Mass. c. 74, §2. This had before been decided in *Packard v. Richardson*, 17 Mass. 122. So in Maine, the memorandum is held sufficient if it do not express the consideration. *Levy v. Merrill*, 4 Greenl. 180; *Cummings v. Desmett*, 26 Maine, 397. So in Connecticut, *Sage v. Wilcox*, 6 Conn. 81. So in South Carolina, *Tyler v. Givens*, Riley's Law Cas. 56, 62, overruling *Stephens v. Winn*, 2 Nott and Mc. 372, n; *Woodward v. Pickett*, Dudley S. Car. Rep. 30. So in New Jersey, *Buckley v. Beardsley*, 2 Southard, 570. So in North Carolina, *Miller v. Irvine*, 1 Dev. & Bat. 103. So in Mississippi, *Wren v. Pearce*, 4 Smedes & Marsh, 91. A different construction has been adopted in New York, and it is there held that

22. And here we may notice a case where an agreement was executed which referred to certain covenants, which had been read, contained in a described paper, which, in fact, contained the terms of the agreement. It appeared that all the covenants contained in that paper had not been read; and which of them had been read, and which had not, was the difficulty, which could only be solved by parol testimony; and Mr. Justice Buller held clearly, that such evidence was inadmissible (i), as it would introduce all the mischiefs, inconvenience, and uncertainty the statute was designed to prevent; and Lord Redesdale has since unqualifiedly approved of this decision (j).

*23. Neither will a performance be compelled on a note or letter, if any error or omission, however trifling, appear in the essential terms of the agreement (l.).

24. Thus in a case (k) (I) before Lord Hardwicke, the bill was brought to have a specific performance of an agreement, from letters which had passed between the parties. It appeared, that a certain number of years purchase was to be given for the land, but it could not be ascertained whether the rents upon a few cowgates were 5s. or 1s.; and although there was no other doubt, Lord Hardwicke held, that such an agreement could not be carried into execution. He said that in these cases it ought to be considered,

(i) *Brodie v. St. Paul*, 1 Ves. jun. 326; *Higginson v. Clowes*, 15 Ves. jun. 516; *Lindsay v. Lynch*, 3 Scho. & Lef. 1.

(j) 1 Scho. & Lef. 38; and see *O'Herlihy v. Hedges*, *ibid.* 123.

(k) *Lord Middleton v. Wilson*, *et c contra*, Chan. 1741, MS.; S. C. *Lofft*, 801,

(I) The case is in Reg. Lib. 1741, fo. 260, by the name of *Lord Middleton v. Eyre*. The estate was sold by an agent to Dr. Wilson, by parol, and the parties appear to have bound themselves by letters, the particulars of which do not appear in the Register's book. The parties beneficially interested afterwards sold the estate for a greater price to Lord Middleton, who filed a bill for a specific performance of the agreement, and Dr. Wilson filed a cross-bill. The cross-bill was dismissed with costs, and in the original cause a specific performance was decreed. The point in the text is not stated in the Register's book.

the writing must in some manner express the consideration. *Sears v. Brink*, 3 John. 210; *Leonard v. Vredenburg*, 8 John. 29. The same construction, adopted in New York, seems to have been adopted and approved in New Hampshire. *Neelson v. Sanborne*, 2 N. Hamp. 414. See *Violet v. Patton*, 5 Cranch, 142; *Taylor v. Ross*, 3 Yerger, 330; 2 Stark. Ev. (5th Am. ed.) 349, n. 1; 3 Kent, (6th ed.) 121, 122; *Bean v. Burbank*, 16 Maine, 460; *DeWolf v. Rabaud*, 1 Peters, 499; *Chitty Contr.* (8th Am. ed.) 65, 66. It is enough in a simple contract under the statute of frauds, in New York, if the consideration can be collected from the contract itself by reasonable construction. *Douglass v. Howland*, 24 Wendell, 35.

(1) See *Per Shaw C. J.* in *Atwood v. Cobb*, 16 Pick. 230, 231.

whether at law the party could recover damages ; for if he could not, the Court ought not to carry such agreements into execution.

25. The late Lord C. J. Mansfield observed, that there had been many cases in Chancery, some of which he thought had been carried too far, where the Court had picked out a contract from letters, in which the parties never certainly contemplated that a complete contract was contained (*l*).

26. If the property be not identified, but is capable of being so by the reference in the agreement or letter, that is sufficient ; therefore a letter written by the seller to the purchaser's solicitor, stating that " he had sold the house, &c. in Newport to Mr. Owen for 1,000 guineas, the money to be paid as soon as the deeds can be had from Mr. Deere," was held valid, as the deeds would show what house was the subject of the contract (*m*).

27. So although a letter do not in itself contain the whole agreement, yet if it *actually refer* to a writing that does, that will be sufficient, although such writing is not signed (*l*).

28. Thus in a case where an estate was advertised to be let for three lives, or thirty-one years, and an agreement was entered into for a lease, in which the term for which it was to be granted was *omitted ; Lord Redesdale held, *that if the agreement had referred to the advertisement*, parol evidence might have been admitted to show what was the thing (namely the advertisement) so referred to, for then it would be an agreement to grant for so much time as was expressed in the advertisement ; and then the identity of the advertisement might be proved by parol evidence (*n*). And Sir William Grant, in a late case, expressed his opinion, that a receipt which did not contain the terms of the agreement, might have been enforced as an agreement, had it referred to the conditions of sale, which would have entitled the Court to look at them for the terms. (*o*).

And where a written offer or proposal to sell was sent by the owner to *A*, followed by another letter from the owner to *A*,

(*l*) 3 Taunt. 172.

(*m*) Owen v. Thomas, 3 Myl. & Kee. 353 ; *supra*, p. 117.

(*n*) See Clinan v. Cooke, 1 Scho. & Lef. 22 ; and see Cass v. Waterhouse, Prec. Cha. 29 ; Hinde v. Whitehouse, 7 East, 558 ; Feoffees of Heriot's Hospital v. Gibson, 2 Dow, 301 ; Powell v. Dillon, 2 Ball & Beat. 416. See Jacob v. Kirk, 2 Mood.

& Rob. Ca. 221.

(*o*) Blagden v. Bradbear, 12 Ves. jun. 466 ; and see Shippey v. Derrison, 5 Esp. Ca. 190 ; Hinde v. Whitehouse, 7 East, 558 ; Kenworthy v. Schofield, 2 Barn & Cress. 945 ; S. C. 4 Dowl. & Ry. 556 ; Turn. & Russ. 352 ; Carroll v. Cowell, 1 Jebb & Sym. 43.

(1) See Lowry v. Dufferin, 1 Irish Eq. 281.

stating that he had just received *A*'s note (which did not appear), and was glad he had determined to purchase the farm, and concluded that he would write to *B* (who had made an offer for the estate) to inform him he had agreed to purchase the estate; Sir W. Grant thought that his letter plainly implied that he had offered to sell upon some terms in which he understood *A* to have acquiesced, for it was evidently not an assent to any terms then first proposed to him. Determination and agreement upon the part of *A* to purchase did seem necessarily to pre-suppose some proposal to sell, for it would be absurd to speak of an original proposal from *A* as a determination and agreement bringing the business to such a close as that it only remained to confer upon the title. This letter therefore clearly implied an antecedent proposal, followed by an acceptance, to which it was an assent. As to the nature of the proposal, there was no controversy. It was in the seller's handwriting, and, coupling that with the letter, it amounted to an agreement signed by the party to be charged within the 4th section of the statute of frauds (*p*). In this case therefore the words were spelled, with a view to collect from them that some proposal or offer had preceded them, and that being made out, parol evidence was admitted to prove the proposal in writing, which had actually been sent.

29. So an agreement not containing the name of the buyer or *seller may be made out by connecting it with a letter from him on the subject (*q*), or with the conditions of sale, where they are referred to by the agreement, and contain the name (*r*).

30. It was said by the Court, in a late case (*s*), that the cases on this subject are not at first sight uniform, but on examination it will be found that they establish this principle,—that where a contract or a note in writing exists which binds one party, any subsequent note in writing signed by the other is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them; but we may further observe, that such a note in writing would bind the party who signs it, although there was no contract or note in writing existing which bound the other party.

(*p*) *Western v. Russell*, 3 Ves. & Bea. 355, 5 Nev. & Man. 251.
187.

(*q*) *Allen v. Bennet*, 3 Taunt. 169; 735. (*r*) *Laythoarp v. Bryant*, 2 Bing. N. C.

Western v. Russell, 3 Ves. & Bea. 187; (*s*) *Dobell v. Hutchinson*, 3 Adol. & Dobell v. Hutchinson, 3 Adol. & Ell. 371; 5 Nev. & Man. 260, *supra*.

31. In a case (*t*) where an agreement for sale was reduced into writing, but not signed, owing to the vendor having failed in an appointment for that purpose; the vendee's agent wrote to urge the signing of the agreement; and the vendor wrote in answer a letter, in which, after stating his having been from home, he said, "his word should always be as good as any security he could give." And this was held by Lord Thurlow to take the case out of the statute, as clearly referring to the written instrument. The ground of this decision was, that the vendor had agreed, by writing, to sign the agreement. If he had said he never would sign it, he could not have been bound; but if he said he never would sign it, but would make it as good as if he did, it would be a promise to perform it; if he said he would never sign it, because he would not hamper himself by an agreement, it would be too perverse to be admitted(*u*). It appears that Lord Thurlow was diffident of his opinion in this case; and Lord Redesdale has declared that he had often discussed the case, and he could never bring his mind to agree with Lord Thurlow's decision, because he (Lord Redesdale) thought the true meaning of the agreement was, "I will not bind myself, but you shall rely on my word" (*x*).

32. But in these cases there must be a clear reference to the *particular paper, so as to prevent the possibility of one paper being substituted for another (*y*) (1).

33. In a case where the memorandum was "Sold 100 Mining Purdy's, at 17s. 6d., J. Greene," the purchaser insisted that the defect in the memorandum was removed by the seller having himself admitted the agreement by sending to the purchaser another paper, containing these words: "I hereby undertake to have transferred to Messrs. John & J. Boyce one hundred shares in the Mining Company of Ireland, as soon as the books are opened for that purpose. Value received, 7th January 1825. James Greene."

(*t*) Tawney v. Crowther, 3 Bro. C. C. 320.
161, 318; and see Forster v. Hale, 3 Ves.

jun. 696; Cooke v. Tombs, 2 Anstr. 420; Tanner v. Smart, 6 Barn. & Cress. 603; Saunderson v. Jackson, 2 Bos. & Pull. 9 Dowl. & R. 549.
238; and 9 Ves. jun. 250; Hoadly v. (y) Boydell v. Drummond, 11 East, 142.
McLain, 10 Bing. 482.

(*u*) Per Lord Thurlow, 3 Bro. C. C.

(1) An imperfect memorandum of the sale of real estate by an auctioneer, and a letter written by the purchaser to the seller, cannot be connected together by parol, so as to take the case out of the statute, there being no reference in the one to the other. Adams v. McMillan, 7 Porter, 73; Freeport v. Bartol, 3 Greenl. 340.

But it was held that this document could not answer the objection made to the other, for it did not refer to it, and could not be connected with it or called in aid of it; and, besides, this document varied from the other in two respects; first, in the names of the parties; for it was an undertaking to transfer to Messrs. John & J. Boyce; secondly, a certain condition was introduced into it which was not in the other instrument (z).

34. A letter written as an *abandonment* of a contract cannot operate within the above rule, as a *ratification* of it so as to supply the want of a signature to the original contract (a).

35. And if the agreement is defective, and the letter refers to a different contract from that proved by the opposite party, the letter cannot be adduced as evidence of the contract set up. The letter must be taken altogether, and if it falsify the contract proved by the parol testimony, it will not take the case out of the statute (b).

36. As we shall hereafter see, an auctioneer is an agent lawfully authorized for the vendor and purchaser within the statute (1). Upon the sale of estates by auction, a deposit is almost universally paid, for which the auctioneer gives a receipt, referring to the particulars or indorsed on them, and amounting, in most cases, to a valid agreement on the part of the vendor within the statute (c). And it seems that a bill of sale, or entry by the auctioneer, of the account of the sale, in his books, stating the name of the owner, the person to whom the estate is sold, and the price it fetched, would be deemed a sufficient memorandum of the agreement to satisfy the statute (d). This, however, it clearly would not, unless it either contained the conditions of the sale and the particulars of *the property, or actually referred to them, so as to enable the Court to look at them (e).

37. In a case upon the sale by auction of a chattel which was within the statute, the sale was made subject to conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue, or referred to by it, and

(z) Batty, 608; *supra*, p. 117.

(a) Gosbell v. Archer, 2 Adol. & Ell. 500; 4 Nev. & Man. 485.

(b) Cooper v. Smith, 15 East, 103.

(c) Blagden v. Bradbear, 12 Ves. jun. 466, *et supra*; Gosbell v. Archer, 2 Adol. & Ell. 500.

(d) See *Emmerson v. Heelis*, 2 Taunt. 33, *et infra*; but see *Mussell v. Cooke*, Prec. Cha. 533; *Charlewood v. Duke of Bedford*, 1 Atk. 497; *Ramsbottom v. Mortley*, 2 Mau. & Selw. 445.

(e) *Blagden v. Bradbear*, *ubi supra*; *Hinde v. Whitehouse*, 7 East, 558.

(1) Post, 131, 132.

the sale was held to be void, although the auctioneer wrote the purchaser's name and the price against the article in the catalogue. The conditions, although in the room, not being actually attached or clearly referred to, formed no part of the thing signed. If the conditions had been separated from the catalogue during the progress of the sale, still the signature to the latter, made after the separation, would have been unavailing (*f*).

38. A note or letter, written by the vendor to any third person, containing directions to carry the agreement into execution, will, subject to the before-mentioned rules, be a sufficient agreement to take a case out of the statute (*g*). This was laid down by Lord Hardwicke, who said, that it had been deemed to be a signing within the statute, and agreeable to the provision of it. And the point was expressly determined, in the year 1719, by the Court of Exchequer (*h*).—Upon an agreement for an assignment of a lease, the owner sent a letter, specifying the agreement, to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page, were of opinion, that the letter was a writing within the statute of frauds. And the same doctrine appears to apply to a letter written by a purchaser (*i*) (1).

39. In *Kenedy v. Lee* (*k*), Lord Eldon observed, that in order to form a contract by letter, he apprehended nothing more was necessary than this, that when one man makes an offer to another to sell for so much, and the other closes with the terms of his offer, there must be a fair understanding on the part of each as to what is to be the purchase-money, and how it is to be paid, and also a reasonable description of the subject of the bargain. It must be understood, however, that the party seeking the specific performance of such an agreement, is bound to find in the correspondence, not *merely a treaty, still less a proposal for an agreement, but a treaty with reference to which mutual consent can be clearly demonstrated, or a proposal met by that sort of acceptance, which makes it no longer the act of one party but of both. It follows, that he is

(*f*) *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

(*g*) *Welford v. Beazely*, 3 Atk. 503. See *Seagood v. Meale*, Prec. Cha. 560; *Cooke v. Tombs*, 2 Anstr. 420; *Owen v. Thomas*, 3 Myl. & Kee. 353.

(*h*) *Smith v. Watson*, Bunb. 55; S. C. MS.

(*i*) *Rose v. Cunynghame*, 11 Ves. jun. 550.

(*k*) 3 Mer. 441; and see *Ogilvie v. Foljambe*, 3 Mer. 53.

(1) See *Givens v. Calder*, 2 Desaus. 171, cited ante, 115, in note.

bound to point out to the Court, upon the face of the correspondence a clear description of the subject-matter relative to which the contract was in fact made and entered into. But he did not mean (because the cases which had been decided would not bear him out in going so far) that he was to see that both parties really meant the same precise thing, but only that both actually gave their assent to that proposition, which, be it what it may, *de facto* arises out of the terms of the correspondence (1). The same construction must be put upon a letter, or a series of letters, that would be applied to the case of a formal instrument; the only difference between them being, that a letter or a correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion.

40. In *Cooth v. Jackson* (1), Lord Rosslyn put the case of a bond of reference to a surveyor, the price to depend upon his valuation, only to ascertain how much an acre the purchaser was to pay for the land. And his Lordship said, he should conceive that not to be within the statute (2).

41. But rent-rolls, particulars of estates, abstracts, &c. delivered by the vendor on the treaty for sale, will not be considered as an agreement, although signed by him, and containing the particulars of the agreement; nor will letters written, or representations made by him, to creditors, concerning the sale, receive that construction.

42. Thus, in a case (*m*) where *A* agreed by parol with *B* for the purchase of lands; shortly afterwards, a rent-roll was delivered to *A*, which *B* dated and altered in his own hand-writing; and it was intituled, "Land agreed to be sold by *B* to *A* from, &c., at twenty-one years' purchase, for the clear yearly rent." An abstract of the title, also, stating the contract, was delivered by *A*'s agent, and also further particulars and papers at different times. *B* also wrote to several of his creditors, informing them that he had agreed with *A* for the sale of the estate, at twenty-one years' purchase; referred tenants to *A* as owner of the estate; and set up the contract as a bar to an *elegit*. *B* afterwards refused to perform the agreement; and to a bill filed for a specific performance, pleaded the statute of frauds, and the plea was allowed.

(1) 6 Ves. jun. 17.

(*m*) *Whaley v. Bagenel*, 6 Bro. P. C. 5.

(1) Chitty Contr. (8th Am. ed.) 9, et seq. and notes.

(2) See *Brown v. Bellows*, 4 Pick. 179, 189, 190.

*43. So, in a later case (*n*), upon a bill filed by a vendee, for a specific performance of a parol agreement for sale of lands, it appeared that the vendor gave the purchaser a particular of the property to be sold, with the terms and conditions, all in his own hand-writing, and signed by him; and it was afterwards delivered, by agreement of both parties, to an attorney, to prepare the conveyance from, who prepared a draft, and brought it to the parties, and they read over and approved of it, and agreed to execute the same, whenever a fair copy could be written out. The defendant, however, refused to fulfil his part of the agreement, and pleaded the statute of frauds to the bill; and, as the particular was delivered at the outset of the treaty, no agreement being then made, the Court held it could only be delivered as a list or catalogue of the matters for sale, to enable the purchaser to form a proper estimate of their value; that the signing the particular could have no other effect than to give it authenticity, as a true list of the items then offered for sale; and that the subsequent acts could not affect the original nature of the particular, and turn it into an agreement (1).

44. Although an agreement be reduced into writing by a person present at the making of it, yet if the parties do not sign it, they will not be bound by it (*o*); and the mere preparation of a draft of the conveyance which recites the agreement in the usual terms, although approved of by the agents on both sides, will not amount to an agreement (*p*).

45. If an agreement contain all the terms, the sending of it, as instructions to a person to prepare a proper agreement, will not be deemed an intention to extend the agreement, but merely to reduce it into technical language (2).

46. Thus, in *Fowle v. Freeman* (*q*), after some treaty for the purchase of an estate, certain terms were agreed upon and written down by Freeman the vendor, and afterwards written out by him, as an agreement; viz.—“March 12th, 1803. I agree to sell to Mr. Fowle my estate, &c. for the sum of 27,000*l*. upon the follow-

(*n*) *Cook v. Tombs*, 2 Anst. 420; and see *Cass v. Waterhouse*, Prec. Cha. 29.

(*o*) *Gunter v. Halsey*, Ambl. 586; *Whitechurch v. Bevis*, 2 Bro. C. C. 559; *Ramsbottom v. Tunbridge*, Ramsbottom v. Mortley, 2 Mau. & Selw. 434. 445.

(*p*) *Marquis of Townsend v. Bishop of*

Norwich, 1 Rep. II. & W. by Jac. 308, n. vide *infra*.

(*q*) *Rolls*, 8th March 1804, MS.; 9 Ves. jun. 351, S. C.; *Dowling v. Maguire*, 1 Rep. temp. Plunket, 1; *Thomas v. Der- ring*, 1 Kee. 729.

(1) See *Hobby v. Finch*, Kirby, 14.

(2) See *Givens v. Calder*, 2 Desaus. 172.

ing conditions, &c.” [stating them.] Freeman signed this agreement, and read it to Fowle, who approved of it. Freeman then underwrote a letter to his solicitor in town to the following effect ; *—“ Sir, please to prepare a proper agreement for Mr. Fowle and me to sign, and send it to me at this place. You will also deliver to Mr. Everett,” (the gentleman who carried the letter to town,) “ an abstract of my title deeds for his examination. As soon as the title-deeds are approved of, he engages to lend me 5,000*l.* till Michaelmas next. The letter was signed and dated by him, and was delivered by Mr. Everett to the solicitor in town. Freeman afterwards refused to perform the agreement ; and, to a bill filed by Fowle for a specific performance, pleaded the statute of frauds. The Master of the Rolls held, that if the attorney had prepared an agreement, according to the letter, Freeman would have been compelled to execute it, and the attorney could not alter the agreement itself in any one respect. A letter or proposal will do, although the party repents ; and many decrees have been founded merely on letters. If this objection were to hold, he said it might be contended, that if an agreement contained a reference to title-deeds to be formally executed, it would not do ; and his Honor decreed a specific performance.

47. In these cases it should be observed, that letters may be stated in a bill as constituting the alleged agreement, or as evidence of an alleged parol agreement. In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic evidence can be received ; in the latter he may plead the statute of frauds (r).

[48. Where the reducing an agreement into writing, or the signing such agreement when reduced into writing, has been *prevented by fraud*, the court of Chancery will support it, because it is one of the principal objects of a court of Equity to relieve against fraud (1).

Where it appeared that the defendant, upon conveyance of lands to him in fee, upon a private trust, promised to reduce the agreement to writing, and keep it as a private memorandum, to be found among his papers in case of his death, in order to secure the rights of the *cestui que trust*, but afterwards refused so to do ; this was held sufficient to take the case out of the statute (2).]

(r) *Birce v. Bletchley*, 6 Madd. 17.

(1) 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, ch. 3. §28 ; *Mullett v. Halfpenny*, Prec. in Chan. 404 ; *Maxwell v. Montacute*, Prec. in Chan. 526 ; Post, 139, note and cases cited.

(2) *Jenkins v. Eldridge*, 3 Story C. C. 181.

SECTION IV.

OF THE SIGNATURE TO AN AGREEMENT.

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| 1. <i>Of specialties and parol contracts.</i> | 12. <i>Initials sufficient.</i> |
| 4. <i>Of the place of the signature.</i> | 14. <i>Signature on particulars and conditions of sale.</i> |
| 7. <i>Signature in form as witness valid.</i> | 16. <i>Alterations of draft of conveyance, &c. insufficient.</i> |
| 9. <i>But not a signature as an attesting witness.</i> | 17. <i>Draft unstamped, evidence.</i> |
| 11. <i>Name of agent sufficient.</i> | |
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1. WE are next to consider what is a sufficient signature by the party or his agent. Before the statute of frauds, an agreement, although reduced into writing and signed, was not considered as *a written agreement unless sealed; but it was regarded as a parol agreement, and the writing as evidence of it (*a*).

2. It has been justly said that the same rule prevails since the statute of frauds (*b*); for the law of England recognizes only two kinds of contracts; viz. specialties and parol agreements, which last include all writings not under seal, as well as verbal agreements not reduced into writing (*c*) (1). In the case of *Wheeler v. Newton* (*d*), the agreement not having been sealed, seems to have been insisted upon, as leaving the case within the statute: and Lord Commissioner Rawlinson said, that agreements in writing, though not sealed, *had some better countenance* since the statute of frauds and perjuries than they had before (1).

3. This doubt must have arisen from the common-law doctrine before noticed, that an agreement not under seal is simply a parol agreement, and the writing evidence of it; but there certainly was no foundation for the doubt:—the statute makes signing only

(*a*) See 1 Ch. Ca. 85.

(*b*) See Marq. of Normanby v. Duke of Devonshire, 2 Freem. 216.

(*c*) Rann v. Hughes, 7 Term. Rep. 350,

n.; S. C. MS. *in tot. verbis*.

(*d*) Prec. Ch. 16.

(1) In *Dawson v. Ellis*, 1 Jac. & Walk. 524, the Court was of opinion, that if A contract verbally to sell to B and afterwards contract by writing to sell to C, and then convey the estate to B, he (B) is not liable to perform the contract with C, although he had notice of it before the conveyance.

requisite to the validity of a written agreement, and it is now clearly established, that sealing is not necessary (1); and if a man be in the habit of printing or stamping instead of writing his name, he would be considered to have signed by his printed name (e).

4. The signature required by the statute is to have the effect of giving authenticity to the *whole* instrument; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found (f) (2).

5. Therefore, the signing the name at the beginning of the agreement will take it out of the statute; as, if a person write the agreement himself, and begin, "*A B* agrees to sell, &c." and this was only in analogy to the case of a testator writing his name at the beginning of his will, which, before the late statute, was equivalent to his signing it; and yet the statute of frauds expressly required a signature (g) (3).

*6. And such a signature will be sufficient, although a place be left for a signature at the bottom of the instrument (h); and yet, as Lord Eldon observed, it is impossible not to see that the insertion of the name at the beginning was not intended to be a sig-

(e) *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Schneider v. Norris*, 2 Mau. & Selw. 286.

(f) *Vide* *Stokes v. Moore*, stated *infra*; *Allen v. Bennet*, 3 Taunt. 169; *Lobb v. Stanley*, 5 Adol. & Ell. N. S. 574.

(g) *Knight v. Crockford*, 1 Esp. Ca. 189; and see 1 Bro.-C. C. 410; 3 Esp.

Ca. 182; 9 Ves. jun. 248; and *Saunderson v. Jackson*, 2 Bos. & Pul. 238. See *Cooper v. Smith*, 15 East, 103; *Morison v. Turnour*, 18 Ves. jun. 175; *Proper v. Parker*, 1 Russ. & Myl. 625; *Bleakley v. Smith*, 11 Sim. 150.

(h) *Saunderson v. Jackson*, *ubi supra*.

(1) The assignment of a lease may be made in writing without seal. *Holliday v. Marshall*, 7 John. 211. "This" say the court, "is obvious from the language of the statute of frauds, which declares an assignment not good, unless it be by deed or *note in writing*." But a blank assignment of a lease made by signing the name of a party and affixing thereto his seal is not regarded as an assignment by deed or *note in writing*, within the requisition of the statute of frauds. *Jackson v. Titus*, 3 John. 430. "To allow the subsequent filling up of the deed by a third person," said Mr. Chief Justice Kent, "to have relation back to the time of the sealing and delivery of the blank paper, in consequence of some parol agreement of the parties, is to open a door to fraud and perjury, and to defeat the wise and salutary provisions of the statute." But see *Ulen v. Kittredge*, 7 Mass. 233; *Nelson v. Dubois*, 13 John. 175; *Clason v. Bailey*, 14 John. 484.

(2) *Penniman v. Hartshorn*, 13 Mass. 87; *Higdon v. Thomas*, 1 Harr. & Gill, 139; *Argenbright v. Campbell*, 3 Hen. & Munf. 144, 198; *Clason v. Bailey*, 14 John. 484; *M'Comb v. Wright*, 4 John. Ch. 659, 663. J. R. B. having five houses, but no other property, in *Cable Street, Liverpool*, agreed to sell them to J. B. for £248; and, thereupon, drew up the following memorandum *in his own hand-writing*, "July 26th, 1839. J. B. agrees with J. R. B. to take the property in *Cable Street*, for the net sum of £248 10s." The agreement was held to be sufficiently signed by the vendor. *Bleakley v. Smith*, 11 Sim. 150.

The signature of a contract, for the sale of lands owned by a mercantile firm, made by one partner in the partnership name, in the presence and with the assent of the other partner, is a sufficient signing by both. *M'Worter v. M'Mahan*, 1 Clarke, 400.

(3) 1 Jarman, Wills, (2d Am. ed.) 70, 71 and notes.

nature, and that the paper was meant to be incomplete till it was further signed.

7. And a party may be bound by his signature, although he subscribe in form as a witness (*i*).

8. So, where a clerk of an agent duly authorized to treat for a principal, signed an agreement thus, "Witness *A B*, for *C D*, agent to the seller," it was holden to be out of the statute (*k*).

9. But an agreement after a sale by auction signed by the purchaser, and regularly witnessed by the auctioneer's clerk, who had full authority to give receipts for him, and did give a separate receipt for the deposit, was of course held not to be so signed as to bind the seller (*l*).

10. Lord Eldon, in the case of *Coles v. Trecothick*, laid it down, that where a party or principal, or person to be bound signs as, what he cannot be, a witness, he cannot be understood to sign otherwise than as principal. But the signature in that case was altogether different from a simple signature as a witness, for though the person in that case called himself a witness, it is evident that he could not have signed as such, since he signed for another person, and it was the same thing as if he had signed merely "E. Philips, for Mr. Smith, agent for the seller" (*m*).

This seems to be the true distinction. In a late case, Lord Denman, C. J., said, he thought Lord Eldon's remark in *Coles v. Trecothick* open to much observation. A witness might be drawn into transactions which he did not contemplate, and of which he was ignorant. That would be a great step to take; no such decision had been actually made, and if it had, he should pause, unless he found it sanctioned by the very highest authority, before he held that a party attesting was bound by the instrument (*n*). But there appears to be no foundation for the doubt thus thrown upon the dictum of Lord Eldon, for he confines his observation to the case where the party or principal, or person to be bound signs as, *what he cannot be, a witness*, and must therefore be considered *to sign in his proper character. The objection is, that a party who was merely required to attest the execution as a witness, might be drawn in to become what he never contemplated, a party to a contract of which he was ignorant. But by the rule as ex-

(*i*) See *Welford v. Beazley*, 1 Ves. 6; 3 Atk. 503; and see 9 Ves. jun. 251.

(*k*) *Coles v. Trecothick*, 9 Ves. jun. 234; 1 Smith's Rep. 233; but see *Blore v. Sutton*, 3 Mer. 237.

(*l*) *Gosbell v. Archer*, 2 Adol. & Ell. 500.

(*m*) See 2 Adol. & Ell. 508, 509; 4 Nev. & Mann. 494.

(*n*) 2 Adol. & Ell. 508.

pressed by Lord Eldon, the person signing is assumed to be really the contracting party. In the case put by way of objection, there would be no real contract by the party to sign.

11. It is not necessary to put down the name of the principal : if the name of the actual bidder, although an agent, be put down, that is sufficient (*o*).

12. And it is sufficient, it seems, if the initials of the name are set down (*p*) (*l*).

13. But a letter without a signature of the name in some way cannot be brought within the statute. Therefore, a letter written by a mother to her son, beginning, "My dear Nicholas," and ending, "your affectionate mother," with a full direction, containing the son's name and place of residence, is not a good agreement within the statute (*q*).

14. It seems that the signature of the purchaser by himself or his agent, on the back of the particulars and conditions of sale, with the sum opposite to it, is a sufficient compliance with the directions of the act (*r*) ; where the paper on which the endorsement is made contains the name of the seller.

15. And, as we have seen, an agreement not signed, may be supported by a signature to a writing referring to the agreement.

16. But the mere altering the draft of the conveyance will not take a case out of the statute (*s*), nor will the written approbation of it by the agents be sufficient, although it recite the contract in the usual way (*t*) ; neither will the writing over of the whole draft by the defendant with his own hand be sufficient, as there must be a signature (*u*). To this rule we may, perhaps, refer the case

(*o*) *White v. Proctor*, 4 Taunt. 209 ; 117 ; 9 Dowl. & Ry. 148 ; cases on the *Kenworthy v. Schofield*, 2 Barn. & Cress. 17th sect. ; *Emmerson v. Heelis*, 2 Taunt. 945. 38.

(*p*) *Phillimore v. Barry*, 1 Camp. Ca. 513 ; see *Jacob v. Kirk*, 2 Mood. & Rob. Ca. 221 ; *Sweet v. Lee*, 3 Mann. & Gran. 452.

(*q*) *Selby v. Selby*, Rolls, 1817, MS. ; *Hubert v. Turner*, 4 Scott, 486.

(*r*) *Vide supra*, and *Hodgson v. LeBret*, Camp. Ca. 233 ; *Phillimore v. Barry*, *ib.* 513 ; *Goom v. Afflalo*, 6 Barn. & Cress.

(*s*) *Hawkins v. Holmes*, 1 P. Wms. 776, which overruled *Lowther v. Carril*, 1 Vern. 221. See *Shippey v. Derrison*, 5 Esp. Ca. 190.

(*t*) *Marquis of Townsend v. Bishop of Norwich*, *supra*, p. 124 ; and see *Doe v. Rdgriph*, 4 Carr. & Pay. 312.

(*u*) *Ithel v. Potter*, 1 P. Wms. 771, cited.

(1) The mark of one unable to write is a sufficient signature. 2 Kent, (6th ed.) 511. See 1 Jarman, Wills (2nd Am. ed.) 112 in note.

The signature may be with a lead pencil. 2 Kent, (6th ed.) 511 ; *Chitty Cont.* (8th Am. ed.) 72 ; *Clason v. Bailey*, 14 John. 484 ; *Merrit v. Clason*, 12 John. 102 ; *McDowel v. Chambers*, 1 Strobb. Eq. 347.

*of *Stokes v. Moore* (x); where the defendant wrote instructions for a lease to the plaintiff in these words; viz. "The lease renewed; Mrs. Stokes to pay the King's tax; also to pay Moore 24*l.* a year, half-yearly; Mrs. Stokes to keep the house in good tenantable repair, &c." Stokes, the lessee, filed a bill for a specific performance, and the Court of Exchequer held it not to be a sufficient signing to take the agreement out of the statute; although it was not necessary to decide the point (1).

Lord Eldon is reported to have said, that he had some doubt of the doctrine in this case (y).

Mr. Baron Eyre appears to have put it on its true grounds. He said, that the signature is to have the effect of giving authenticity to the whole instrument; and if the name is inserted *so as to have that effect*, he did not think it signified much in what part of the instrument it was to be found; it was, perhaps, difficult, except in the case of a letter with a postscript, to find an instance where a name inserted in the middle of a writing can well have that effect; and then the name being generally found in a particular place by the common usage of mankind, it may very *probably* [qu. properly] have the effect of a legal signature, and extend to the whole; but he did not understand how a name inserted in the body of an instrument, and *applicable to particular purposes*, could amount to such an authentication as is required by the statute.

17. A draft of an agreement not signed, may be given in evidence without a stamp, although a memorandum is written upon it, "We approve of the within draft," and is signed by both parties; for those words do not import an agreement, but merely an evidence of something they intended to agree to (z). Still where the parties themselves, not being professional persons, sign such a memorandum, it is a question to be decided in each case, whether they signed in that form as simply approving of the draft as such, or whether they intended to give validity to it as an agreement.

(x) *Stokes v. Moore*, 1 Cox, 219; Cox's nt. to 1 P. Wms. 771. See 1 Smith's Rep. 244; *Hubert v. Treherne*, 3 Man. & Gran. 743; 4 Scott, N. R. 436; *Lobb v. Stanley*, 5 Adol. & Ell. N. S. 574.

(y) And see *Emmerson v. Heelis*, 2

Taunt. 38, and observe how the purchaser's name was signed there. See also *Morrison v. Turnour*, 18 Ves. jun. 175; *Western v. Russell*, 3 Ves. & Bea. 187; *Ogilvie v. Foljambe*, 3 Mer. 53.

(z) *Doe v. Rdgriff*, 4 Carr. & Pay. 312.

(1) See *Irvine v. Thompson*, 4 Bibb, 295.

*SECTION V.

OF SIGNATURE BY AGENTS.

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| 1. <i>Agent appointed by parol good.</i>
4. <i>Clerk of agent requires distinct authority.</i>
5. <i>Revocation of authority.</i>
7. <i>Signature for one party sufficient, whether lands or goods.</i> | 6. 8. <i>Auctioneer and clerk agents for both parties.</i>
13. <i>Although an agent bid.</i>
14. <i>Where auctioneer can sign for a party and sue him.</i>
16. <i>Ratification of act of assumed agent.</i> |
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1. IN considering what signature satisfies the requisition of the statute, we have necessarily adverted to signatures by agents; and it will now be proper to consider who will be deemed an agent lawfully authorized, within the statute of frauds, to sign an agreement for the sale or purchase of an estate.

2. In the first and third sections of the statute of frauds, which relate to leases, &c. the writing is required to be signed by the parties making it, or their agent *authorized by writing*. This latter requisite is omitted in the fourth and seventeenth sections of the statute (1). The Legislature seems to have taken this distinction, that where an interest is intended to be actually passed, the agent must be authorized by writing; but that where a mere agreement is entered into, the agent need not be constituted by writing; and therefore an agent may be authorized by parol to treat for, or buy an estate, although the contract itself must be in writing (a) (1) It is, however, in all cases, highly desirable that

(a) Waller v. Hendon, 5 Vin. Abr. 524, pl. 45; Wedderburne v. Carr, in the Exchequer, T. T. 1775; 3 Wooddes. 423, cited; Rucker v. Cammeyer, 1 Esp. Ca. 175; Coles v. Trecothick, 9 Ves. jun. 234; 1 Smith's Rep. 233; Barry v. Lord Barry-

more, 1 Sch. & Lef. 28, cited; Clinan v. Cooke, *ib.* 22; Emmerson v. Heelis, 2 Taunt. 38; see 2 Nev. & Per. 530; Graham v. Musson, 5 Bing. N. C. 603; Callaghan v. Pepper, 2 Ir. Eq. Rep. 399.

(1) In a note to Mr. East's 7th vol. p. 565, it is said, that by the fourth section, to affect lands, the note must be signed by an agent thereunto lawfully authorized *by writing*, &c., which words, "by writing," are omitted in the seventeenth section, touching the sale of goods. This mistake must be attributed to the hurry of the press, for the agent is in neither section required to be authorized by writing.

(1) Where a statute, such as the statute of frauds, requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an

the agent should have a written authority. Where he has merely a parol authority, it must frequently be difficult to prove the existence *and extent of it (*b*); although it may be observed that his testimony will be received with great caution against his signature as agent. If, however, at the time of signing, he make a declaration that he has no authority, his principal will not be bound (*c*). But of course, although he purchase in his own name, yet the fact of the agency so as to charge the principal may be made out by parol evidence (*d*).

3. In a case in Ireland (*e*), where upon a parol offer, the owner wrote to a third person, stating, that if he thought the proposal the value of the place, he (the owner) was satisfied, and the purchaser deposited the purchase-money with the third person, who made a memorandum of it, and stated that he considered it a great price, and signed it; the agreement was enforced upon the ground that the third person was acting in the place of the seller, and every dealing with the one was a dealing with the other.

4. Although an agent is authorized to sell at a particular price, yet it seems that his clerk cannot contract without a special authority or agreement for that purpose (*f*); which, however, need not be in writing.

5. The principal may revoke the authority of the agent at any time before an agreement is executed according to the statute, although the agent has previously agreed *verbally* to sell the property (*g*); and an intended purchaser may in like manner revoke his authority to his agent to purchase (*h*) (1). And, on the other hand, he may adopt the act of a man acting as his agent (*i*).

(*b*) *Mortlock v. Buller*, 10 Ves. jun. 292. See *Daniel v. Adams*, Amb. 495; *Charlewood v. The Duke of Bedford*, 1 Atk. 497; and see 5 Vin. Abr. 522, pl. 35; *Wyatt v. Allen*, MS. App. No. 9.

(*c*) *Howard v. Braithwaite*, 1 Ves. & Beam. 202.

(*d*) *Wilson v. Hart*, 1 Moore, 45; see *Marston v. Roe*, 8 Adol. & Ell. 14.

(*e*) *Field v. Boland*, 1 Dru. & Walsh, 37.

(*f*) *Coles v. Trecothick*, 9 Ves. jun. 234; *Blore v. Sutton*, 3 Mer. 237; see 4 Barn. & Adol. 446.

(*g*) See *Farmer v. Robinson*, 2 Camp. Ca. 339, n.

(*h*) As to sales by auction, see *Blagden v. Bradbear*, 12 Ves. jun. 467; *Mason v. Armitage*, 13 Ves. jun. 25.

(*i*) Vide *infra*, p. 134; *De Beil v. Thomson* 3 Beav. 469.

agent to sign it in his behalf, unless the statute positively requires, that the authority also should be in writing. *Story, Agency*, §50; *Blood v. Hardy*, 15 Maine, 61; *Champlin v. Parish*, 11 Paige, 405; *Alna v. Plummer*, 4 Greenl. 258; *Epis. Church of Macon v. Wiley*, 2 Hill Ch. 428; *Anderson v. Chick*, 1 Bailey Eq. 118; *McComb v. Wright*, 4 John. Ch. 659; *Mortimer v. Cornwell*, 1 Hoff. Ch. 351; *Botts v. Cozine*, ib. 80; *Lawrence v. Taylor*, 5 Hill, 107, 112; *Shaw v. Nudd*, 8 Pick. 9; *Chitty Contr.* (8th Am. ed.) 195, 196 and notes; *Dunlap's Paley's Agency*, 159, 160 and notes; *Ewing v. Tees*, 1 Binney, 450; *Talbot v. Bowen*, 1 Marsh. (Kentucky) 436. But see *Nicholson v. Mifflin*, 2 Dall, 246; *Meredith v. Mucoss*, 1 Yeates, 200; *Vanhorn v. Frick*, 6 Serg. and R. 90.

(1) See *Story, Agency*, §§465—467; *Dunlap's Paley's Agency*, 185.

6. The auctioneer and his clerk may be considered as the constituted agents of the vendor; he appoints the former to announce the biddings, and the latter to take down the names of the purchasers and the prices of the lots.

7. The statute requires every agreement as to lands, or some memorandum or note thereof, to be in writing, and signed *by the party to be charged*, or some other person *thereunto*, (that is, to the signing thereof) (*k*) by *him* authorized. And that as to goods, some note or memorandum in writing of the bargain shall be made *and signed by the *parties* to be charged by such contracts, or their *agents* thereunto authorized. And yet it has been decided, that the signature of the party to be charged by himself or agent is sufficient, even in a contract for goods (*l*), although the other party has not signed, and consequently is not bound; so that there appears to be no difference between the two clauses of the statute, in regard to the appointment and power of an agent.

8. It has, however, been repeatedly decided, that an auctioneer is the agent of both parties upon a sale of goods, so as to be enabled to bind them both under the statute (*m*) (1); whilst, on the contrary, it had been decided, and lately seemed to be the prevailing opinion, that the auctioneer was not the agent of the purchaser upon a sale by auction of *estates*, so as to be authorized to bind him by setting down in writing the terms of the contract (*n*); but in a late case, upon the sale of an interest within the fourth section, the Court of Common Pleas held, that the auctioneer was an agent

(*k*) See 1 Ves. & Beam. 207.

(*l*) Allen *v.* Bennet, 3 Taunt. 169.

(*m*) Simon *v.* Motivos, 3 Burr. 1921; Bull. Ni. Pri. 280; 1 Blackst. 599; Rucker *v.* Cammeyer, 1 Esp. Ca. 105; Hinde *v.* Whitehouse, 7 East, 558; and see Rondeau *v.* Wyatt, 2 H. Blackst. 67; and 1 Ca. & Opin. 142, 143; Phillimore *v.* Barry, 1 Camp. Ca. 513; and see the

observations in the 2d edit. of this work, p. 57—64.

(*n*) Stansfield *v.* Johnson, 1 Esp. Ca. 101; Walker *v.* Constable, 2 Esp. Ca. 659; 1 Bos. & Pul. 306; Buckmaster *v.* Harrop, 7 Ves. jun. 341; 13 Ves. jun. 456; Coles *v.* Trecothick, 9 Ves. jun. 234; 1 Smith, 257; see 13 Ves. jun. 473.

(1) The auctioneer or his clerk may be the agent of both parties; and the signature of either to an entry, otherwise sufficient, in the auctioneer's book, or to a memorandum stating the terms of the contract and the parties thereto, or which refer to the particulars or conditions of sale, or is indorsed thereon, will satisfy the act. Chitty, Contr. (8th Am. ed.) 272; Cleaves *v.* Foss, 4 Greenl. 1; Jenkins *v.* Hogg, 2 Const. Ct. Rep. 821; Gordon *v.* Sims, 2 M'Cord Ch. 164; Pugh *v.* Chesseldine, 11 Ohio, 109; Baptist Church *v.* Bigelow, 16 Wendell, 28; Burke *v.* Haley, 2 Gilman, 614; Hart *v.* Woods, 7 Blackf. 568; M'Comb *v.* Wright, 4 John. Ch. 659; Episcopal Church of Macon *v.* Wiley, 2 Hill Ch. 428; Anderson *v.* Chick, 1 Bailey Eq. 118; Alna *v.* Plummer, 4 Greenl. 258; 2 Kent, (6th ed.) 540; Buckmaster *v.* Harrop, 7 Vesey (Sumner's ed.) 341, note (c); Bennett *v.* Carter, Dudley S. C. 142; Meadows *v.* Meadows, 3 M'Cord, 458; Adams *v.* M'Millan, 7 Porter, 73; Entz *v.* Mills, 1 M'Mullan, 453; Brent *v.* Green, 6 Leigh, 16.

for the purchaser, even upon a sale of estates. Lord C. J. Mansfield, in delivering judgment, asked, By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly, and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots; therefore he writes the name by the authority of the purchaser, and he is an agent for the purchaser (*o*). In a later case (*p*), the Court of Common Pleas adhered to their former decision, and they considered the signature by the auctioneer of the purchaser's name alone, sufficient, although he was only an agent, to bind the principal; and the conditions expressly required that the highest bidder should sign a contract for the purchase. The principal, however, was present, and did not object to the signature by the auctioneer until after it was made. The action in this case was brought for the auction duty. Upon a bill filed by the seller for a specific performance, the Master of the Rolls decreed it, following the decisions in the Common Pleas, although his own opinion was, that an auctioneer is not the agent of the purchaser (*q*). *The rule, therefore, may now be laid down generally, that an auctioneer is an agent lawfully authorized by the purchaser.

9. And an auctioneer's clerk who takes down the biddings openly is considered the agent of both the seller and purchaser (*1*). The clerk is constituted deputy by the whole room, and the purchasers, by their silence when the hammer falls, give him their authority to execute the contract on their behalf, and this prevents the necessity of each purchaser coming to the table to make the entry for himself. It is not necessary to suppose that the vendor rested a particular confidence in the auctioneer for the purpose of putting down the names in the sale-book. He may be taken to have constituted that person his agent for the making of such entries whom the auctioneer might choose to appoint (*r*).

10. But upon a sale of goods by an executor, who before the sale agreed with a legatee that he might bid at the sale, and the price should be set off against the legacy, which the legatee did, it

(*o*) *Emmerson v. Heelis*, 2 Taunt. 38. See 1 Cas. and Opin. 142, 143.

(*p*) *White v. Proctor*, 1 Taunt. 209.

(*q*) *Kemys v. Proctor*, 3 Ves. & Bea.

57; 1 Jac. & Walk. 350; *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

(*r*) See *p*. 134.

(1) Ante, 132, in note.

was held that an action by the seller for the price, under the conditions of sale, could not be maintained; that the auctioneer is not *ex vi termini* agent for both parties, and that he was not so here; and that his putting down the name was merely to fix the price, and not to bind this purchaser to the conditions: the purchaser under conditions of sale cannot give evidence to vary the contract, but here, properly speaking, the legatee did not so purchase (*s*).

11. And this principle of implied agency in an auctioneer is not extended to other cases (*t*).

12. It was always clear, that an auctioneer, appointed by a vendor, was a good agent for *him* within the statute (*u*).

13. And although a purchaser bid by an agent, yet the auctioneer is still duly authorized to sign the agreement (*w*).

14. The agent must be a third person; neither of the contracting parties can be the agent of the other (*x*); and therefore, although a purchaser is bound by the signature of the auctioneer, yet the auctioneer himself, cannot, although the seller could, maintain an action upon such a contract, because the agent whose signature *is to bind the defendant must not be the other contracting party upon the record (*y*) (1).

15. This, however, has since been doubted (*z*); and it was held that the auctioneer's clerk can bind the purchaser by an entry made in his presence; and as the clerk had made the entry, the auctioneer was allowed to maintain the action. It was not necessary to overrule *Farebrother v. Simmons*; but the opinion of the Court was in favor of the auctioneer's power to maintain an action, although he signed as agent of the other party. It was certainly irregular, it was said, that the contracting parties should act as each other's agents, but it was very different where the contract is signed by an individual who was not either of the contractors.

16. Finally, a contract by one as agent for another is valid under the statute, although the alleged agent had no authority at the

(*s*) *Bartlett v. Purnell*, 4 Adol. & Ell.

792. (*t*) *Lord Glengal v. Barnard*, 1 Kee.

769. (*u*) *Vide supra*.

(*w*) *Emmerson v. Heelis*, 2 Taunt. 38;

White v. Proctor, 4 Taunt. 209.

(*x*) See *Wright v. Dannah*, 2 Camp. 283 (17th section).

(*y*) *Farebrother v. Simmons*, 5 Barn. & Ald. 333 (17th section).

(*z*) *Bird v. Boulter*, 1 Nev. & Mann. 313; 4 Barn. & Adol. 447 (17th section); see *Graham v. Musson*, 5 Bing. N. C. 603.

(1) See *Story, Agency*, §9; *Dunlap's Paley's Agency*, 33 in note (3), 160, in note (7).

time, provided that the alleged principal afterwards ratifies the contract (a)(1).

(a) *Maclean v. Dunn*, 4 Bingh. 722; 1 Moo. & Pay. 761; see *Gosbell v. Archer*, 2 Adol. & Ell. 500.

(1) See *Dunlap's Paley's Agency*, 171 and note; *Chitty Contr.* (8th Am. ed.) 202 and note.

SECTION VI.

OF PAROL AGREEMENTS NOT WITHIN THE STATUTE.

2. Sales by auction within the statute.

3. Sales before a Master not.

5. Agreements confessed not.

10. But agreement may be admitted and statute insisted upon.

12. Conviction of perjury.

1. WE have seen what is considered a sufficient agreement to take a case out of the statute; but there are cases in which the performance of an agreement will be compelled, although the terms of it are not reduced to writing: for though the statute provided that no agreement should be good, unless signed by the party to be bound thereby, or some person authorized by him, yet on all the questions upon that statute, the purport of making it has been considered, viz. to prevent frauds and perjuries; and where there *has appeared to be no danger of either, the courts have endeavored to take the case out of the statute (a).

2. Upon this ground it was that in the case of *Simon v. Motivos*, Lord Mansfield and Mr. Justice Wilmot expressed a clear opinion, in which Mr. Justice Yates was inclined to concur, that sales by auction were not within the statute, because the solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The case, however, which arose upon the sale of goods, was determined upon the ground of the constructive agency of the auctioneer (b), who had set down in writing the name of the purchaser, &c. (c).

Succeeding Judges have entertained a different opinion on the

(a) See 1 Ves. 221.

(b) Vide *supra*.

(c) 3 Burr. 1921; Bull. Ni. Pri. 286; 1 Blackst. 599.

great question, whether sales by auction are within the statute of frauds; and it has accordingly been since frequently decided, that sales by auction of estates (*d*), and even of goods, are within the statute (*e*) (1).

3. But on the ground that there is no danger in such a transaction of either fraud or perjury, a sale before a Master, under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the Court, in confirming the purchase, takes it out of the statute (*f*) (2).

4. So if, under a reference to a Master, an agreement be made to lay out trust-money in the purchase of particular lands, and the Master make his report accordingly, and the report be confirmed without any opposition by the owner of the estate, the purchase will be carried into a specific execution, although no agreement was signed by the vendor. The sale is a judicial sale, which takes it entirely out of the statute (*g*) (3).

5. It has been repeatedly determined in equity (*h*), that if a bill be brought for the execution of an agreement not in writing, nor so stated in the bill, yet if the defendant put in his answer, and confess the agreement, that takes the case entirely out of the mischief intended to be prevented by the statute; and there being no *danger of perjury, the Court would decree it; and if the defendant should die, upon a bill of revivor against his heir, the same decree would be made as if the ancestor were living, the principle going throughout, and equally binding the representatives (*i*) (4).

6. Lord Bathurst, however, held that an agreement, not in part performed, could not be carried into execution, although confessed

(*d*) *Stansfield v. Johnson*, 1 Esp. Ca. 101; *Walker v. Constable*, 2 Esp. Ca. 659; 1 Bos. & Pul. 303; *Buckmaster v. Harrop*, 7 Ves. jun. 341, affirmed on appeal, Dec. 1806; *Blagden v. Bradbear*, 12 Ves. jun. 466; and *Coles v. Trecothick*, 9 Ves. jun. 249; *Hinde v. Whitehouse*, 7 East, 558; *Mason v. Armitage*, 13 Ves. jun. 25; *Higginson v. Clowes*, 15 Ves. jun. 516. The case of *Symonds v. Ball*, 8 Term Rep. 151, turned on the particular provisions of another act of parliament.

(*e*) *Kenworthy v. Schofield*, 2 Barn. & Cress. 945; 4 Dowl. & Ry. 556.

(*f*) *Attorney General v. Day*, 1 Ves. 218; and see 12 Ves. jun. 472.

(*g*) S. C.

(*h*) *Croyston v. Banes*, Prec. Cha. 208; and see 1 Ves. 221, 441; *Ambl. 586*; *Mose. 370*; and *Symondson v. Tweed*, Prec. Cha. 437; *Gilb. Eq. Rep. 55*; *Wanby v. Sawbridge*, 1 Bro. C. C. 414, cited.

(*i*) *Per* Lord Hardwicke, see 1 Ves. 221.

(1) 2 Kent, (6th ed.) 539, 540; *Chitty Contr.* (8th Am. ed.) 272; *Dunlap's Paley's Agency*, 313, 314 and notes; ante, 131, 132 and in notes; *Jackson v. Catlin*, 2 John. 248; 8 John. 406; *Simonds v. Catlin*, 2 Caines Rep. 61, 64.

(2) See *Boykin v. Smith*, 3 Munf. 102.

(3) See *Per* Kent, J. in *Simonds v. Catlin*, 2 Caines Rep. 64.

(4) See note, post, 138.

by the answer. In *Eyre v. Popham* (*k*), addressing himself to Mr. Ambler, he asked if there was any case in which there had been a decree founded upon a confession generally without a part performed? and Mr. Ambler replied, that in some of the cases, the Chancellor had been mentioned to have said it, but he never found a decree. In giving judgment, he is reported to have said, "This is not an agreement in writing, upon the statute of frauds; but the question is, whether it is an agreement which so appears as that the Court will decree a performance. It has been said, that it is a known rule in this Court, that where an agreement appears confessed, the Court will decree a performance though no part has been performed; some *dictums* there have been, but Mr. Ambler confesses that he has found no decree—that where the substance clearly appears, though in parol, without any part performed, the Court will decree an agreement to be executed. I think it cannot be possible; this Court cannot repeal the statute of frauds, or any statute. The King has no such power, by the constitution, intrusted to him; and therefore there can be no such power in his delegates. The only case I know that takes a contract out of the statute is of fraud, and the jurisdiction of this Court is principally intended to prevent fraud and deceit. Where a party has given ground to another to think he had a title secured, the Court will secure it to him. The ground, therefore, in making and refusing decrees, has been fraud. It can never be laid down by the Court, that where the substance appears it shall be executed. It would not have been so at common law."

7. In the discussion of the foregoing case, neither the bar nor the Court appear to have been aware of a case before Lord Macclesfield (*l*), in which the defendant having pleaded the statute of frauds to a bill seeking a specific performance of a parol agreement, he said, the plea was proper, but then the defendant ought, by answer, to deny the agreement; for if he confessed the agreement, the Court would decree a performance, *notwithstanding the statute*; for that such confession would not be looked upon as perjury, *or intended to be prevented by the statute. And he therefore confirmed an order, that the plea should stand for an answer, with liberty for the plaintiff to except thereto, and that the benefit thereof should be saved to the defendant until the hearing of the

(*k*) Lofft, 508, 509; and see *Eyre v. Iveson*, 2 Bro. C. C. 563, cited.

(*l*) *Child v. Godolphin*, 1 Dick. 39; 2

Bro. C. C. 563, cited; and see *Hartley v. Wilkinson*, Irish Term Rep. 357.

cause. And Lord Hardwicke appears to have entertained the same opinion (*m*) (1).

8. In *Whitchurch v. Bevis* (*n*), Lord Thurlow at first expressed his opinion, that the only effect of the statute was, that an agreement should not be proved *aliunde*. No evidence that could be given would sustain the suit if the defendant answered and denied the agreement. In this case the agreement was confessed, but the statute was pleaded, and it was ultimately decided on its own particular circumstances. Lord Thurlow said, he meant to determine upon the ground of this particular case; because it might become to be more seriously considered what sort of a verbal agreement, notwithstanding the plea of the statute of frauds, might be sustained, as being confessed by the answer, so as the Court would carry it into execution. He added, that he was prepared to say, if there were general instructions for an agreement, consisting of material circumstances to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the *locus pœnitentiæ*, he should not be compelled to perform such an agreement as that, *when he insists upon the statute of frauds*.

9. It is curious to observe the different opinions which have prevailed on this point. Lord Macclesfield held, that if the agreement was confessed, even a plea of the statute would not protect the defendant; in which opinion he seems to have been followed by Lord Hardwicke. On the other hand, Lord Bathurst thought that, unless there were fraud, an admission of the agreement by the defendant would not enable the Court to decree it, although the defendant did not insist on the statute. Lord Thurlow appears to have been of opinion, that if the agreement was admitted, the statute could only be used as a defense where there was a clear *locus pœnitentiæ*, but that evidence could not be admitted to falsify the defendant's answer.

10. None of the foregoing opinions has, however, been attended to. Mr. Baron Eyre seems to have led the way in holding, that if the defendant, by his answer, insisted upon the statute of frauds, *a specific performance could not be decreed, although he confessed

(*m*) See *Cottingham v. Fletcher*, 2 Atk. 155; and see 3 Atk. 3; but see 4 Ves. 569 note (*i*) 2 Dick. 661. jun. 24. (*n*) 2 Bro. C. C. 559; [Perkins's ed.

(1) See *Smith v. Brailsford*, 1 Desaus. 350.

the agreement (*o*). And Lord Thurlow, notwithstanding his opinion in *Whitchurch v. Bevis*, said, in the prior case of *Whitbread v. Brockhurst*, that it should rather seem that if the defendant confesses the agreement in his answer, but insists upon the statute, it would be more simple and conformable to reason to say, that the statute should be a bar to the plaintiff's claim (*p*): and these opinions have been adopted by Lord Rosslyn and Lord Eldon (*q*); and Sir William Grant actually decided, that the statute may be used as a bar to the relief, although the agreement be admitted (*r*). It is immaterial, he said, what admissions are made by a defendant insisting upon the benefit of the statute, for he throws it upon the plaintiff to show a complete written agreement; and it can no more be thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement (*1*).

11. Where, however, a defendant has, by answer, admitted the agreement, and submitted to perform it, he cannot, by an answer to an amended bill, plead the statute of frauds (*s*) (*2*).

12. If the defendant deny the agreement, he may be tried for perjury; but a conviction will not enable equity to decree a performance of the agreement (*t*) (*I*); and therefore, as the plaintiff

(*o*) *Stewart v. Careless*, 2 Bro. C. C. 466; [Sumner's ed. note (*c*)] see also 2 564, 565, cited; *Walters v. Morgan*, 2 Ball & Beat. 349.

(*p*) See 1 Bro. C. C. 416.

(*q*) *Moore v. Edwards*, 4 Ves. jun. 23; *Cooth v. Jackson*, 6 Ves. jun. 12; *Row v. Teed*, 15 Ves. jun. 375; see *Rondeau v. Wyatt*, 2 H. Blackst. 63; and 1 Rose, 300.

(*r*) *Blagden v. Bradbear*, 12 Ves. jun.

(*s*) *Spurrier v. Fitzgerald*, 6 Ves. jun. 548.

(*t*) *Bartlett v. Pickersgill*, 4 Burr. 2255; 4 East, 577, n. (*b*); 1 Cox, 15. See *Rastel v. Hutchinson*, 1 Dick. 44, and *Fell v. Chamberlain*, 2 Dick. 484; *Burden v. Browning*, 2 Taunt. 520.

(*I*) It appears that the plaintiff in *Fell v. Chamberlain* did prefer a bill of indictment for perjury against the defendant; and the Master of the Rolls granted an order to the six clerks to deliver the bill and answer, interrogatories, and depositions of witnesses to a solicitor, in order to be produced at the trial. Reg. Lib. A. 1772, fo. 496.

(1) It is now settled, that a party, who admits a parol agreement by answer, may nevertheless have the benefit of the statute, if he, by his answer, prays the benefit of it. If he does not thus insist on the benefit of the statute, he must be taken to renounce it. *Woods v. Dike*, 11 Ohio, 455, 2 Story Eq. Jur. §755 to §758; *Flagg v. Mann*, 2 Sumner C. C. 528, 529; *Newton v. Swazey*, 8 N. Hamp. 9; *Thompson v. Todd*, 1 Peters C. C. 388; *Talbot v. Bowen*, 1 Marsh. 437; *Rowton v. Rowton*, 1 Hen. & Munf. 91; *Stearns v. Hubbard*, 8 Greenl. 320; *Story Eq. Pl.* §763; *Ontario Bank v. Root*, 3 Paige, 478; *Cozine v. Graham*, 2 Paige, 177; *Thornton v. Henry*, 2 Scammon, 219; *Argenbright v. Campbell*, 3 Hen. & Munf. 144; *Givens v. Calder*, 3 Desaus, 171; *Harris v. Knickerbocker*, 5 Wendell, 638; *Allen v. Chambers*, 4 Iredell Eq. 125; *Smith v. Brailsford*, 1 Desaus. 350; *Kerr v. Love*, 1 Wash. 172; *Fowler v. Lewis*, 2 Marsh. 445.

(2) *Story Eq. Pl.* §763; 2 *Story Eq. Jur.* §755; *Cozine v. Graham*, 2 Paige,

cannot avail himself in any civil proceedings of the conviction of the defendant, he is a competent witness to prove the perjury (*u*).

13. But in *Rex v. Dunston* (*x*), where the agreement was by parol, and the defendant pleaded the statute, and by answer denied the agreement itself, upon an indictment for perjury, Abbott, C. J., said that it did not appear from the note of *Bartlett v. *Pickersgill* whether the statute of frauds was there pleaded and relied on. But in this case, as the defendant had pleaded the statute, he was of opinion that his denial of an agreement, which by the statute was not binding upon him, was immaterial. It is necessary that the matter sworn to, and said to be false, should be material and relevant to the matter in issue.

(*u*) *The King v. Boston*, 4 East, 572.

(*x*) *Ry. & Mood*. 109.

177 ; *Ontario Bank v. Root*, 3 Paige, 478 ; *Woods v. Dike*, 11 Ohio, 455 ; 2 Daniell Ch. Pr. (1st Am. ed.) 751 and in note ; *Vaupell v. Woodward*, 2 Sandf. Ch. 143.

Where the defendant has neglected to put in an answer, in compliance with a rule of the court, it was held a sufficient admission, to charge a party upon a contract, within the statute of frauds, set forth in the bill. *Newton v. Swazey*, 8 N. Hamp. 1.

SECTION VII.

OF FRAUD AND PART PERFORMANCE.

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| 1. <i>Agreement in writing prevented by fraud.</i> | 10. <i>Payment of purchase-money insufficient, semble.</i> |
| 2. <i>Part performance, parol agreement enforced.</i> | 16. <i>Payment of auction duty insufficient.</i> |
| 3. <i>What acts are a part performance.</i> | 17. <i>Acts done to a man's own prejudice.</i> |
| 4. <i>Delivery of abstracts or the like, not.</i> | 18. <i>Distinct lots.</i> |
| 5. <i>Delivery of possession sufficient.</i> | 19. <i>Where terms of agreement are uncertain.</i> |
| 6. <i>Unless referable to another title, or wrongfully obtained.</i> | 29. <i>Representatives bound where part performance.</i> |
| 7. <i>Payment of rent, where sufficient.</i> | 30. <i>Whether remainder-man bound.</i> |
| 8. <i>Expenditure in improvements.</i> | 31. <i>Issue directed.</i> |

1. THERE are other cases taken out of the statute, not so much on the principle of no danger of perjury, as that the statute was not intended to create or protect fraud. Lord Keeper North ap-

pears to have entertained a floating opinion, although he never actually decided the point, that if the plaintiff laid in his bill that it was part of the agreement that the agreement should be put into writing, it would take the case out of the statute (a). In a case before Lord Thurlow (b), this doctrine was stated at the bar; and in answer to it he said, he took that to be a single case, and to have been overruled. *If you interpose the medium of fraud, by which the agreement is prevented from being put into writing, he agreed to it* (1), otherwise he took Lord North's doctrine, 'that if it had been laid in the bill, that it was a part of the agreement that it should be put into writing, it would have done,' to be a single *decision, and contradicted, though not expressly, yet by the current of opinions.

2. So where agreements have been carried partly into execution, the Court will decree the performance of them, in order that one side may not take advantage of the statute, to be guilty of fraud (c) (I) (2).

(a) *Hollis v. Whiting, or Edwards*, 1 C. 565.
 Vern. 151, 150; *Leake v. Morrice*, 2 (c) See 1 Ves. 221; *Taylor v. Beech*, 1
 Cha. Ca. 135. Ves. 297.

(b) *Whitchurch v. Bevis*, 3 Bro. C.

(I) The ground of relief in these cases is fraud, and that species of fraud which is conusable in equity only; although it seems that the Court of King's Bench once held, that where an agreement was partly executed, *it was totally out of the statute*. See 1 Bro. C. C. 417.

(II) In this case the plaintiff not only purchased the house, but also the furniture, for which she had actually paid; and it appears by the decree, that there was a receipt given by the defendant, the contents of which, however, are not stated in the Registrar's book. The defendant positively denied the agreement, and insisted that the plaintiff was only tenant at will. Reg. Lib. A. 1785, fo. 552, by the name of *Denton v. Seward*; *ibid.* 717, by the name of *Denton v. Stewart*.

(1) See *Jenkins v. Eldredge*, 2 Story C. C. 181, 290 to 293; *Taylor v. Luther*, 2 Sumner C. C. 228; ante, 125; 2 Story Eq. Jur. §768; *Phyfe v. Wardell*, 2 Edwards Ch. 47; *Kennedy v. Kennedy*, 2 Alabama, 571; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Wesley v. Thomas*, 6 Harr. & John. 24; *Watkins v. Stockett*, 6 Harr. & John. 435; *Chetwood v. Brittain*, 1 Green Ch. 438. The law is otherwise in Mississippi, *Box v. Stanford*, 13 Smedes & Marsh. 93.

(2) 4 Kent, (6th ed.) 451; *Phillips v. Thompson*, 1 John. Ch. 131; *Eaton v. Whitaker*, 18 Conn. 222; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279; *Maryland Savings Bank v. Schroeder*, 8 Gill, & John. 94; *Carlisle v. Fleming*, 1 Harr. 421; *Tilton v. Tilton*, 9 N. Hamp. 385; *Jenkins v. Eldredge*, 3 Story C. C. 181; 2 Story Eq. Jur. §759; *Annan v. Merritt*, 13 Conn. 479, 491; *Newton v. Swazey*, 8 N. Hamp. 9, 13; *Smith v. Patton*, 1 Serg. & R. 80; *Wetmore v. White*, 2 Caines Cas. 87; *Billington v. Welsh*, 5 Binney, 129, 131; *Chitty Contr.* (8th Am. ed.) 272, 273, in notes; *Niven v. Belknap*, 2 John. 573, 587.

The ground on which courts of equity proceed in decreeing specific performance of parol contracts, within the statute of frauds, partly executed, is, that it would be a fraud upon the party, who has acted under the agreement, if the transaction were not completed. *Hamilton v. Jones*, 3 Gill, & John. 127; *Heth v. Wooldridge*, 6 Randolph, 605, 607; *Carlisle v. Fleming*, 1 Harr. 421, 430; *Town-*

3. An agreement will not be considered as partly executed, unless the acts done are such as could be done with no other view or design than to perform the agreement, or perhaps, to speak more correctly, with the view of the agreement being performed; and if it do not appear but the acts done might have been done with other views, the agreement will not be taken out of the statute (*d*) (1).

4. Neither will acts merely introductory, or ancillary to an agreement, be considered as a part-performance, although attended with expense. Therefore, delivering an abstract, giving directions for conveyances, going to view the estate, fixing upon an appraiser to value stock, making valuations, &c. (*e*), will not take a parol agreement out of the statute (2).

(*d*) *Gunter v. Halsey*, Ambl. 586; *Lacon v. Mertins*, 3 Atk. 1; and see 19 Ves. jun. 479.

(*e*) *Clerk v. Wright*, 1 Atk. 12; *Whitbread v. Brockhurst*, 1 Bro. C. C. 412; *Cole v. White*, 1 Bro. C. C. 409, cited;

Whitchurch v. Bevis, 2 Bro. C. C. 559; *Whaley v. Bagenal*, 6 Bro. P. C. 645; *Cooke v. Tombs*, 2 Anst. 420; and see *Cooth v. Jackson*, 6 Ves. jun. 12; and *Redding v. Wilkes*, 3 Bro. C. C. 400.

end *v. Houston*, ib. 532, 540; *Anderson v. Chick*, 1 Bailey Eq. 118, 124; *M'Kee v. Phillips*, 9 Watts, 95, 96; *Allen's estate*, 1 Watts & S. 383, 385; *Parkhurst v. VanCortlandt*, 1 John. Ch. 274, 284.

In some of the States the courts do not undertake to decree specific performance of parol agreements within the statute, although there has been a part performance. See *Patton v. McClure*, Martin & Yerger, 333; *Ridley v. McNairy*, 2 Humph. 174; *Dwight v. Pomeroy*, 17 Mass. 303, 327; *Brooks v. Wheelock*, 11 Pick. 439; *Ellis v. Ellis*, 1 Dev. Eq. 341; *Albea v. Griffin*, 2 Dev. & Batt. Eq. 9; *Dunn v. Moore*, 3 Iredell Eq. 334; *Allen v. Chambers*, 4 Iredell Eq. 130; *Box v. Stanford*, 13 Smedes & Marsh. 93; *Beaman v. Buck*, 9 ib. 210.

In Massachusetts and Maine, the equity powers of the court, by statute, extend only to the specific performance of *written* contracts. *Dwight v. Pomeroy*, 17 Mass. 303, 327; *Brooks v. Wheelock*, 11 Pick. 439; *Bubier v. Bubier*, 24 Maine, 42; *Rev. Stat. Mass. Ch. 81, §8*; *Rev. Stat. Maine, Ch. 96, §10*; and they have no jurisdiction to decree a specific performance of a parol contract under any circumstances. *Stearns v. Hubbard*, 8 Greenl. 320; *Wilton v. Harwood*, 23 Maine, 131.

An agreement for the conveyance of land, not reduced to writing, although performed in part by each party, cannot be enforced *by an action at law*, for the recovery of damages. *Norton v. Preston*, 15 Maine, 14; *Adams v. Townsend*, 1 Metcalf, 483; *Sherburne v. Fuller*, 5 Mass. 138; *Kidder v. Hunt*, 1 Pick. 328; *Griswold v. Messenger*, 6 Pick. 517; *Thompson v. Gould*, 20 Pick. 134; *Jackson v. Pierce*, 2 John. 223; *Freeport v. Bartol*, 3 Greenl. 340; *Barickman v. Kuyden-dall*, 6 Blackf. 22, 24; *Chitty Contr.* (8th Am. ed.) 273; *Eaton v. Whitaker*, 18 Conn. 222, 231. At law, however, if lands are actually conveyed in execution of a parol contract, such performance will take the case out of the statute, so far as to enable the grantor to recover the consideration promised to be paid by the grantee. *Linseott v. McIntire*, 15 Maine, 201; *Wilkinson v. Scott*, 17 Mass. 249; *Dillingham v. Runnels*, 4 Mass. 400; *Sherburne v. Fuller*, 5 Mass. 132.

(1) *Phillips v. Thompson*, 1 John. Ch. 131, 149; *Blakeney v. Ferguson*, 3 English, 272; *Carlisle v. Fleming*, 1 Harr. 421; *Goodhue v. Barnwell*, Rice, 198; *Anderson v. Chick*, 1 Bailey Eq. 118; *Keats v. Rector*, 1 Arkansas, 391; 2 Story Eq. Jur. §761, §762; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 318; *Smith v. Smith*, 1 Richardson Eq. 130, 133; *Robertson v. Robertson*, 9 Watts, 32, 42; *Anthony v. Leftwick*, 3 Randolph, 238, 247, 277.

(2) 2 Story Eq. Jur. §760; *Smith v. Smith*, 1 Richardson Eq. 130, 132.

5. But if possession be delivered to the purchaser, the agreement will be considered as in part executed (*f*)(1); especially if he expend money in building or improving according to the agreement ^{*}(*g*), for the statute should never be so turned, construed, or used, as to protect or be a mean of fraud (*h*) (2).

6. Possession, however, must be delivered in part-performance; for if the purchaser obtain it wrongfully, it will not avail him (*i*) (3). And a possession which can be referred to a title distinct from the agreement will not take a case out of the statute. Therefore, possession by a tenant cannot be deemed a part-performance. The delivery of possession, by a person having possession, to the person claiming under the agreement, is a strong and marked circumstance; but a tenant of course continues in possession, unless he has notice to quit; and the mere fact of his continuance in possession (which is all that can be admitted, for *quo animo* he con-

(*f*) *Butcher v. Stapely*, 1 Vern. 363; *Pyke v. Williams*, 2 Vern. 465; *Lockey v. Lockey*, Prec. Cha. 518; *Earl of Aylesford's case*, 2 Stra. 783; *Binstead v. Coleman*, Bunb. 65; S. C. MS. in *tot. verbis*; *Barrett v. Gomeserra*, Bunb. 94; *Lacon v. Mertins*, 3 Atk. 1; *Wills v. Stradling*, 3 Ves. jun. 378; *Bowers v. Cator*, 4 Ves. jun. 91; *Denton v. Stewart*, 4th July 1786, cited in Mr. Fonbl. note to 1 Trea. Eq. 175; *Gregory v. Mighell*, 18 Ves. jun. 328; *Kine v. Balfe*, 2 Ball & Beat. 343; *Morphett v. Jones*,

Rolls, Feb. 1818, MS.; 1 Swanst. 172.

(*g*) *Foxcraft v. Lister*, 2 Vern. 456; *Gilb. Eq. Rep.* 4, cited; *Col. P. C.* 108, reported; *Floyd v. Buckland*, 2 Freem. 268; *Mortimer v. Orchard*, 2 Ves. jun. 243; *Toole v. Medlicott*, 1 Ball & Beatty, 393. See *Wheeler v. D'Esterre*, 2 Dow, 359; and see 19 Ves. jun. 479; *Sutherland v. Briggs*, 1 Hare, 26.

(*h*) See 3 Burr. 1919.

(*i*) *Cole v. White*, 1 Bro. C. C. 409, cited.

(1) *Eaton v. Whitkaker*, 18 Com. 222; *Tilton v. Tilton*, 9 N. Hamp. 386, 390; *Allen's estate*, 1 Watts & S. 383; *Pugh v. Good*, 3 ib. 56; *Johnson v. Glancy*, 4 Blackf. 94, 98.

(2) *Lowry v. Tew*, 3 Barbour, Ch. 407; *Blakeney v. Ferguson*, 3 English, 272; *Brock v. Cook*, 3 Porter, 464; *Annan v. Merritt*, 13 Conn. 479; *Massey v. M'H-wain*, 2 Hill Ch. 426; *Anderson v. Chick*, 1 Bailey Eq. 118; *Moore v. Beasley*, 3 Ham. (Ohio), 294; *Wilber v. Paine*, 1 ib. 251; *Shirley v. Spencer*, 4 Gilman, 583; *Keats v. Rector*, 1 Arkansas, 391; *Thornton v. Henry*, 2 Seamon, 216; *Allen's estate*, 1 Watts & Serg. 383; *Newton v. Swazey*, 8 N. Hamp. 9; 4 Kent, (6th ed.) 451; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274; 2 Story Eq. Jur. §761; *Pugh v. Good*, 3 Watts & Serg. 56; *Drury v. Conner*, 6 Harr. & John. 288; *Ellis v. Ellis*, Dev. Eq. 180; *Tibbs v. Barker*, 1 Blackf. 58; *Town v. Needham*, 3 Paige, 545; *Wetmore v. White*, 2 Caines Cas. 87; *Moreland v. Lemasters*, 4 Blackf. 383; *Byrd v. Oden*, 9 Alabama, 756; *Finucane v. Kearney*, 1 Freeman, 65, 69; *Simmons v. Hill*, 4 Harr. & M'Hen. 252.

But in North Carolina, part performance, such as payment of the whole of the purchase money, and the delivery of possession to the vendee, will not dispense with a writing, if the statute of frauds be insisted on, nor admit parol proof of a contract different from that stated in the answer to a bill for specific performance. *Allen v. Chambers*, 4 Iredell Eq. 125.

(3) See *Jervis v. Smith*, 1 Hoff. Ch. Rep. 470; 2 Story Eq. Jur. §763; *Givens v. Calder*, 2 Desaus, 171; *Anderson v. Chick*, Bailey Eq. 118, 124; *Hood v. Bowman*, 1 Freeman, Ch. 290, 293; *Robertson v. Robertson*, 9 Watts, 32, 42; *Lord v. Underdunck*, 1 Sandford, 46, 48; *Thompson v. Scott*, 1 M'Cord Ch. 32, 39.

tinued in possession, is not a subject of admission) cannot weigh with the Court (*k*) (1).

7. But if he pay an additional rent, although that is *per se* an equivocal circumstance (for it may be that he shall hold only from year to year, the lease being expired), yet there may be other inducements. If, therefore, it be averred that the landlord accepted the additional rent upon the foot of the agreement, the acceptance upon the ground of the agreement will not be equivocal at all. The landlord, in such a case, must answer whether it was accepted upon a holding from year to year, or any other ground (*l*).

8. If it be part of such a contract with a tenant in possession, that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord), it is very strong to take it out of the statute (*m*) (2). But it is necessary that the act should unequivocally refer to and result from the agreement, and be such that the party would suffer an injury amounting to fraud, by the refusal to execute that agreement. Therefore, where upon the faith of a promise of a renewal, a tenant rebuilt a party-wall, the agreement was held to be within the statute. The act done was equivocal (3); for it would have taken place equally if there had been no agreement; it was such also as easily admitted of compensation, without executing the agreement. The money expended might be recovered from *the landlord, if it was by the landlord that the expense was to be borne (*n*).

9. In a late case, Lord Redesdale thought that it was absolutely necessary for courts of equity, in these cases, to make a stand, and not carry the decisions farther (*o*) (4).

(*k*) *Wills v. Stradling*, 3 Ves. jun. 378; *Smith v. Turner*, Prec. Cha. 561, cited; *Savage v. Carroll*, 1 Ball & Beatty, 265; see *Dowell v. Dew*, 1 You. & Coll. C. C. 345; *Lord Desart v. Goddard*, 1 Wall. & Lyne, 347.

(*l*) *Wills v. Stradling*, *ubi sup.*

(*m*) S. C.

(*n*) *Frame v. Dawson*, 14 Ves. jun. 386. See *Lindsay v. Lynch*, 2 Scho. & Lef. 1; *O'Reilly v. Thompson*, 2 Cox, 271; *Parke v. Smith*, 1 Coll. 624.

(*o*) See 2 Scho. & Lef. 5; *Brennan v. Bolton*, 2 Dru. & War. 349. See *Palmer v. White*, 1 Wall. & Lyne, 10, where the agreement is by an agent.

(1) *Jones v. Peterman*, 3 Serg. & Rawle, 543; *Smith v. Smith*, 1 Richardson, Eq. 130, 133, 136; *Johnston v. Glancy*, 4 Blackf. 94; *Anthony v. Leftwick*, 3 Randolph, 238; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 318.

(2) See *Mundy v. Jolleffee*, 5 My. & Cr. 167; *Southerland v. Briggs*, 1 Hare, 26.

(3) *Byrne v. Romaine*, 2 Edw. 445, 446; *German v. Machin*, 6 Paige, 289, 293.

(4) 2 Story Eq. Jur. §766; *Phillips v. Thompson*, 1 John. Ch. 131; *Grant v. Naylor*, 4 Cranch, 234; *King v. Riddle*, 7 Cranch, 171; *Clementson v. Williams*, 8 Cranch, 74; *Massey v. M'Ilwain*, 2 Hill Ch. 421, 426; *Johnson v. Glancy*, 4 Blackf. 94, 99; *Hood v. Bowman*, 1 Freeman, 290, 294; *Anthony v. Leftwick*, 3 Randolph, 238, 244; *Allen's estate*, 1 Watts & Serg. 383; *Frye v. Shepler*, 7 Barr, 91; *German v. Machin*, 6 Paige, 289, 293.

10. It is generally understood, that payment of a substantial part of the purchase-money will take a parol agreement out of the statute. How far this opinion is well-founded, appears to be deserving of particular consideration (1).

11. There are four cases in *Tothill*, which arose previously to the statute of frauds, and appear to be applicable to the point under consideration; for equity, even before the statute of frauds, would not execute a mere parol agreement not in part performed. In the first case (*p*), which was heard in the 38th of Eliz., relief was denied, "because it was but a preparation for an action upon the case." In the two next cases (*q*), which came on in the 9th of Jac. 1, parol agreements were enforced, apparently on account of the payment of very trifling parts of the purchase-money, but the particular circumstances of these cases do not appear. The last case reported in *Tothill* (*r*) was decided in the 30th of Jac. 1, and the facts are distinctly stated. The bill was to be relieved concerning a promise to assure land of inheritance, of which there had not been any execution, but only 55s. paid in hand, and the bill was dismissed. This point received a similar determination, in the next case on the subject before the statute, which is reported in *Cha. Rep.* (*s*), and was determined in the 15th *Cha. 2*. So the same doctrine was adhered to in a case which occurred three years afterwards, and is reported in *Freeman* (*t*); for although a parol agreement for a house, with 20s. paid, was decreed without further execution proved, yet it appears by the judgment, that the relief would not have been granted if the defendant, the vendor, had demurred to the bill, which he had neglected to do, but had proceeded to proof. The last case which I have met with previously to the statute, was decided in the 21st *Car. 2* (*u*), and there a parol agreement, upon which only 20s. were paid, was carried into a specific execution. This case probably turned, like the one immediately *preceding it, on the neglect of the defendants to demur to the bill. It must be admitted, that the foregoing decisions are not easily reconcilable, yet the result of them clearly is, that payment of a trifling part of the purchase-money was not a part-performance of a parol agreement. Whether payment of a considerable sum would have availed a purchaser, does not appear. In

(*p*) *William v. Nevill*, *Toth.* 135.

(*s*) *Simmons v. Cornelius*, 1 *Cha. Rep.*

(*q*) *Ferne v. Bullock*, *Toth.* 206; *Clark* 128.

v. Hackwell, *ibid.* 228.

(*t*) *Anon.* 2 *Freem.* 128.

(*r*) *Miller v. Blandist*, *Toth.* 85.

(*u*) *Voll v. Smith*, 3 *Cha. Rep.* 16.

(1) *Post*, 146 note; *Jackson v. Cutright*, 5 *Munf.* 308.

Toth. 67, a case is thus stated : “ *Moyl v. Horne*, by reason 200*l.* was deposited towards payment, decreed.” This case may, perhaps, be deemed an authority that, prior to the statute, the payment of a substantial part of the purchase-money would have enabled equity to specifically perform a parol agreement ; but it certainly is too vague to be relied on.

12. Our attention is now called to the statute itself. The clause relating to lands declares generally, that no contract, not in writing, shall be enforced by action ; there is also a clause in the act, which relates to sales of goods, which are declared to be binding if something is given in earnest or part payment to bind the bargain.

13. The first case in the books, subsequently to the statute, is in *Freem. (x)*, where it is stated, that a contract for land, and a *great part* of the money paid, is void since the statute of frauds and perjuries ; but the party that paid the money may, in equity (I), recover back the money. And for this Freeman states he saw Sir William Jones’s opinion under his hand. This was about four years after the act. The next case is *Leak v. Morrice (y)*, which occurred in the same year : the bill was to have an agreement performed by the defendant ; which was, in effect, that the defendant should assign a term of years in his house and certain goods, for two hundred guineas, whereof he paid one in hand as earnest of the bargain, and three days after nineteen guineas more ; and part of the bargain was, that it should be executed by writings, by a certain time. The defendant pleaded the statute

(x) 1 *Freem.* 486. ca. 664 b.

(y) 2 *Cha. Ca.* 135 ; 1 *Dick.* 14.

(I) At this day it may be recovered at law. [*Chitty Contr.* (8th Am. ed.) 273, in note ; *Gillett v. Maynard*, 5 *John.* 85. Expenses incurred in faith of a parol agreement, which is violated by the party receiving the benefit, may, *at law*, be recovered in an action of *indebitatus assumpsit*. *Kidder v. Hunt*, 1 *Pick.* 328, *Richards v. Allen*, 17 *Maine*, 296 ; *Luey v. Bundy*, 9 *N. Hamp.* 298. If money has been paid to him, it may be recovered back. If labor has been performed for him, a compensation for it may be recovered. *Lane v. Shackford*, 5 *N. Hamp.* 133 ; *Holbrook v. Armstrong*, 1 *Fairf.* 81 ; *Cabot v. Haskins*, 3 *Pick.* (2nd ed.) 95, note. See also *Squire v. Whipple*, 1 *Vermont*, 69 ; *Kidder v. Hunt*, 1 *Pick.* 328 ; *Little v. Martin*, 3 *Wendell*, 219 ; *Shute v. Dorr*, 5 *Wendell*, 204 ; *Burlinghame v. Burlinghame*, 7 *Cowen*, 92 ; *Freeport v. Bartol*, 3 *Greenl.* 340 ; *Lockwood v. Barnes*, 3 *Hill*, 128 ; *Parkhurst v. Van Cortlandt*, 1 *John. Ch.* 273.

A contract for the sale of lands though not in writing, seems not to be void, but voidable merely. *Sims v. Hutchins*, 8 *Smedes & Marsh.* 328 ; *Minis v. Morse*, 15 *Ohio*, 588 ; *Whitney v. Cochran*, 1 *Seammon*, 210. While the vendor is able and willing to comply, the purchaser can maintain no action to recover back the consideration paid. *Duncan v. Baird*, 8 *Dana*, 101 ; *Lane v. Shackford*, 5 *N. Hamp.* 133 ; *Shaw v. Shaw*, 6 *Vermont*, 75 ; *Oldham v. Sale*, 1 *B. Monroe*, 78 ; *Coughlin v. Knowles*, 7 *Metcalf*, 57 ; *Sims v. Hutchins*, 8 *Smedes & Marsh.* 328].

of frauds, and alleged the money was only paid for the lease, but confessed the receipt of the twenty guineas, and offered to repay them. Lord Keeper North said, it was clear that the defendant ought to repay the money, but overruled the plea on another ground. In this case it does not appear to have occurred to either the bar or the court, that payment of money would take a parol contract for lands out of the statute. The case of *Alsop v. *Patten* (z), arose about fifteen years afterwards. There a joint lessee of a building lease agreed to sell his moiety to the other lessee for four guineas, and accepted a pair of compasses in hand to bind the bargain. The vendor pleaded the statute to a bill filed by the purchaser for a performance in specie. Lord Chancellor Jefferies ordered him to answer, and saved the benefit of the plea to the hearing, as the agreement was, in some part, executed. In this case, unless there was a part-performance of the agreement, independently of the mere delivery of the compasses, it is clear that the Court confounded the section of the statute by which personal contracts are binding, if earnest is paid, with the clause relating to land. The next case is *Seagood v. Meale* (a), which arose thirty-four years after the case of *Alsop v. Patten*. The case was, that upon a parol agreement for sale of an estate for 150*l.*, a guinea was paid, and the payment of the guinea was agreed to be clearly of no consequence in case of an agreement touching lands or houses, the payment of money being only binding in cases of contracts for goods. In this case we find the doctrine laid down generally, that the payment of money is not a part-performance of a parol agreement for lands, and no distinction was taken, as seems sometimes to have been thought, between the payment of a substantial part of the purchase-money, and of a trifling portion. Then comes the case of *Lord Fingal, or Lord Pengal v. Ross*, which was decided by Lord Cowper, in the 8th of Anne (b) (1). *A* agreed with *B* to make him a lease for twenty-one years of lands rendering rent, *B* paying *A* 150*l.* fine. *B* paid 100*l.* in part, then *A* refused to execute the agreement; and upon a bill filed for a specific performance, the agreement was held to be within the statute; but the 100*l.* was decreed to be refunded.

(z) 1 Vern. 472.

(b) 2 Eq. Ca. Abr. 46. pl. 12.

(a) Prec. Cha. 560.

(1) It has been said, that this case is not to be found in the Registrar's book. See 4 Ves. jun. 721. The author himself has searched the Registrar's calenders for 1709 and 1710 without success. The search was made under the letters L (the plaintiff being a lord) P and F.

The Lord Chancellor said, the payment of this 100*l.* was not such a performance of the agreement on one part, as to decree an execution on the other; for the statute of frauds makes one sort of contracts, viz. personal contracts, good, if any money is paid in earnest. Now that statute says, that no agreement concerning lands shall be good, except it is reduced into writing; and therefore, a parol agreement, as it was in that case, would not be good by giving money by way of earnest. Thus far no room is left for doubt; but in *Lacon v. Mertin* (*c*), Lord Hardwicke laid it down, *that paying money had always been considered as a part-performance. This, however, was a mere *dictum*; it was not necessary to decide the question; the cases on the subject were not cited; and another rule is laid down too generally in the same report. A case, indeed, is said to have been decided in 1750 (*d*), at which time Lord Hardwicke was Chancellor, where the bill was to compel the *acceptance* of a lease under a parol agreement upon a fine of 150*l.*, and 16*l.* paid in part of the same; and the plea was overruled, without hearing the counsel for the plaintiff, and the decision, it is said, appears by the Registrar's book (*i*). But it does not appear from this statement, whether there was or was not any other act of part-performance; and it is a sufficient objection to this decision, that the plaintiff's counsel were not heard, as no one can deny that the point was open to argument. The next case is a recent one (*e*), in which Lord Rosslyn held, that the payment of a small sum, as five guineas, where the purchase-money is 100*l.*, would not take the case out of the statute; but he seemed clearly of opinion, that payment of a considerable part of the purchase-money would be sufficient; and he treated the case of Lord Fingal *v.* Ross as ill determined. However, it was not necessary to decide the question. The opinion was clearly extra-judicial. In the late case of *Coles v. Trecothick* (*f*), where the purchase-money was 20,000*l.* and 2,000*l.* were paid in part,

(*c*) 3 Atk. 1.

(*d*) *Dickinson v. Adams*, 4 Ves. jun. 722, cited.

(*e*) *Main v. Melbourn*, 4 Ves. jun. 720.

(*f*) 9 Ves. jun. 234; *Ex parte Hooper*, 1 Mer. 7.

(*i*) The author has searched the Registrar's calendars for 1750, with great attention, but without success. He met with only one case where the plaintiff's name was Dickinson, and there the defendant's name was Baskerville; and the case is on a different point. Reg. Lib. A. 1750, fol. 545. Neither does a case in the same book, fol. 514, by the name of Davis *v.* Adams, embrace the point in question. The search was made under the letter A as well as the letter D.—Note, the case perhaps turned on the principle stated in page 146, *infra*.

the point was treated at the bar as doubtful, and the Court evidently declined giving an opinion on the subject.

14. Upon the whole, it appears clearly, that since the statute of frauds, the payment of a small sum cannot be deemed a part-performance. The *dicta* are in favor of a considerable sum being a part-performance, but this construction is not authorized by the statute, and it is opposed by a case, in which the contrary was decided, upon the most convincing grounds. On this subject, Sir William Grant's admirable judgment in *Butcher v. Butcher* (g), must occur to every discerning mind; it turns on a subject so *applicable to the present, that his arguments, with a slight alteration, directly bear upon it. To say that a *considerable* share of the purchase-money must be given, is rather to raise a question than to establish a rule. What is a considerable share, and what is a trifling sum? Is it to be judged of upon a mere statement of the sum paid, without reference to the amount of the purchase-money?—If so, what is the sum that must be given to call for the interference of the Court? What is the limit of amount at which it ceases to be trifling, and begins to be substantial? If it is to be considered with reference to the amount of the purchase-money, what is the proportion which ought to be paid? Mr. Booth also was impressed with this difficulty, although his sentiments are not so forcibly expressed. Where, he asks, will you strike the line? And who shall settle the quantum that shall suffice in payment of part of any purchase-money, to draw the case out of the statute; or ascertain what shall be deemed so trifling as to leave the case within it (h)?

15. Since the above observations were written, a decision of Lord Redesdale's has appeared, in which he held clearly that payment of purchase-money is not a part-performance; and although he did not advert to all the cases on the subject, yet his decision it is to be hoped will put the point at rest. He said, that it had always been considered that the payment of money is not to be deemed a part-performance, to take a case out of the statute. *Seagood v. Meale* is the leading case on that subject; there a guinea was paid by way of earnest; and it was agreed clearly, that that was of no consequence in case of an agreement touching lands. Now, if payment of fifty guineas would take a case out of the statute, payment of one guinea would do so equally; for it is paid in both

(g) 9 Ves. jun. 382.

(h) 1 Ca. and Opin. 136.

cases as part-payment, and no distinction can be drawn (*i*) ; but the great reason, he added, why part-payment does not take such an agreement out of the statute, is, that the statute has said, that in another case, viz. with respect to goods, it shall operate as a part-performance. And the Courts have therefore considered this as excluding agreements for lands, because it is to be inferred, that when the Legislature said it should bind in case of goods, and were silent as to the case of lands, they meant that it should not bind in the case of lands (*k*) (1).

16. But, even admitting that the payment of purchase-money may be deemed a part-performance, yet it was held that the payment of the auction duty, however considerable, would not enable *the Court to decree a specific performance of a parol agreement; as the revenue laws could not be held to operate beyond their direct and immediate purpose, to affect the property and vary the rights of the parties not within the intention of the act (*l*).

17. In some cases it has been decided, that acts done by the defendant to his own prejudice, could be made a ground for compelling him to perform the agreement ; but Sir William Grant held the contrary, where there is no prejudice to the plaintiff (*m*), because the ground on which the Court acts, is fraud in refusing to perform, after performance by the other party (*n*) (2) ; but where the defendant

(*i*) See acc. *Cordage v. Cole*, 1 Saund. 319.

(*k*) *Clinan v. Cooke*, 1 Scho. & Lef. 22; and see *O'Herlihy v. Hedges*, *ib.* 123; 14 Ves. jun. 388.

(*l*) *Buckmaster v. Harrop*, 7 Ves. jun. 341; 13 Ves. jun. 456.

(*m*) *Buckmaster v. Harrop*, *ubi sup.* See *Hawkins v. Holmes*, 1 P. Wms. 770; and see *post* ch. 4, n. observations on *Potter v. Potter*.

(*n*) See *Popham v. Eyre*, Lofft. 786; *Clinan v. Cooke*, 1 Scho. & Lef. 22; and *O'Herlihy v. Hedges*, *ibid.* 123.

(1) "The more modern doctrine now is," says Mr. Chancellor Kent, "that payment of part, or even of the whole, of the purchase money is not of itself and without something more, a part performance that will take the case out of the statute, for the money may be repaid. 4 Kent, (6th ed.) 451; *Sites v. Keller*, 6 Ham. (Ohio,) 483; *Pollard v. Kinner*, *ib.* 528; *Keats v. Rector*, 1 Arkansas, 392; 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, Ch. 3, §37 and note; 2 Story Eq. Jur. §760, §761, §762; *Allen v. Booker*, 2 Stewart, 21; *Meredith v. Naish*, 3 Stewart, 267; *Barickman v. Kuydendall*, 6 Blackf. 21; *M'Kee v. Phillips*, 9 Watts, 85; *Parker v. Wells*, 6 Wharton, 153; *Hatcher v. Hatcher*, 1 McMullan, 211; *Smith v. Smith*, 1 Richardson Eq. 130, 132, 135; *Eaton v. Whitaker*, 18 Conn. 222; *Finucane v. Kearney*, 1 Freeman Ch. 65, 68; *Hood v. Bowman*, *ib.* 290, 294; *M'Kee v. Phillips*, 9 Watts, 85, 86; *Parker v. Wells*, 6 Wharton, 153. See *Wetmore v. White*, 2 Caines Cas. 87; *Billington v. Welsh*, 5 Binney, 131; *Smith v. Patton*, 1 Serg. & Rawle, 80; *Bassler v. Niesly*, 2 Serg. & Rawle, 355; *Thompson v. Todd*, 1 Peters, 388; *Bell v. Andrews*, 4 Dallas, 152; *Townsend v. Houston*, 1 Harring. 532. In this last case it was held that the payment of a substantial part of the purchase money, was in chancery, a sufficient part performance.

(2) *Maryland Savings Institute v. Schroeder*, 8 Gill & John, 91; *Carlisle v. Fleming*, 1 Harr. 421; *Keats v. Rector*, 1 Arkansas, 391; 2 Story Eq. Jur. §759. 4 Kent, (6th ed.) 451.

has, for instance, paid the auction duty or purchase-money, it is no fraud on the vendor, *but a loss to himself*, which ought not to be made a ground for a specific performance against himself.

18. Where a person purchases several lots of an estate, included in distinct articles of sale, a part-performance as to one lot will not be deemed a part-performance as to the other lots, and will therefore only take the agreement out of the statute as to the lot in respect of which there was a part-performance (*o*) (1).

19. It may happen, that although an agreement be in part performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the statute (2). If, however, the terms be made out satisfactorily to the Court, contrariety of evidence is not material (*p*), and the Court will use its utmost endeavors to get at the terms of the agreement (3).

20. In the case of *Mortimer v. Orchard* (*q*), where a parol agreement with two persons had been in part performed, the plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The Chancellor thought in strictness the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and there were two defendants who proved the agree-

(*o*) *Buckmaster v. Harrop*, 7 Ves. jun. 241. *Lynch*, 2 Scho. & Lef. 1; *Mundy v. Jolliffe*, 9 Sim. 413; *London and Birmingham Railway Co. v. Winter*, 1 Cra.

(*p*) See 1 Ves. 221.

(*q*) 2 Ves. jun. 243. See *Lindsay v. Phil*. 57.

(1) But it would seem to be otherwise, in New York, where the contract is entire and indivisible, though relating to different parcels of land. *Smith v. Underdunk*, 1 Sandford, 579, 581. But see contrary in Pennsylvania, *Allen's estate*, 1 Watts & Serg. 384, 389; *McClure v. McClure*, 1 Barr, 374, 379; *Pugh v. Good*, 3 Watts & Serg. 56.

(2) 2 Story Eq. Jur. §764; *Colson v. Thompson*, 2 Wheaton, 336, 341; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 274, 284; *German v. Machin*, 6 Paige, 288; *Anthony v. Leftwick*, 3 Randolph, 238, 246; *Miller v. Cotten*, 5 Georgia, 341, 351; *Massey v. Milwain*, 2 Hill Ch. 421, 426; *Allen v. Chambers*, 4 Iredell Eq. 125; *Hatcher v. Hatcher*, 1 McMullan Eq. 311, 315; *Tilton v. Tilton*, 9 N. Hamp. 385; *Sage v. McGuire*, 4 Watts & Serg. 228, 229.

The existence of the contract must be made out by clear and satisfactory evidence, to entitle a party to take the case out of the statute of frauds, on the ground of part performance. The act of part performance must clearly appear to be of the identical contract set up by him. It is not enough that the act is evidence of some agreement, but it must be unequivocal and satisfactory evidence of the particular agreement charged to have been made. *Phillips v. Thompson*, 1 John. Ch. 131; *Hall v. Hall*, 1 Gill, 383; *Chambers v. Lecompte*, 9 Missouri, 575; *Carlisle v. Fleming*, 1 Harr. 421; *Goodhue v. Barnwell*, 1 Rice, 198; *German v. Machin*, 6 Paige, 288; 2 Story Eq. Jur. §763, §764; *Simmons v. Hill*, 4 Harr. & M'Hen. 252; *Phyfe v. Wardwell*, 1 Edw. Ch. 51, 52; *Moale v. Buchanan*, 11 Gill & John. 314; *Graham v. Yeates*, 6 Harr. & John. 229.

(3) See *Mundy v. Jolliffe*, 5 Mylne & Cr. 177; *Rhodes v. Rhodes*, 3 Sandford, 279; *Burns v. Southerland*, 7 Barr, 103, 106.

ment set up by their answers, he decreed a specific performance of the agreement confessed by the answers.

21. In one case where, upon the faith of a parol agreement, a man entered and built, it was proved that the defendant told the *plaintiff that his word was as good as his bond, and promised the plaintiff a lease when he should have renewed his own from his landlord. Lord Chancellor Jefferies said, that the defendant was guilty of a fraud, and ought to be punished for it ; and so decreed a lease to the plaintiff, *though the terms were uncertain*. It was, he said, in the plaintiff's election for what time he would hold it, and he elected to hold during the defendant's term at the old rent, but the *plaintiff* was to pay costs (*r*).

22. And in a case from Yorkshire, possession having been delivered in pursuance of a parol agreement, and a dispute arising upon the terms of the agreement, Lord Thurlow sent it to the Master, upon the ground of the possession being delivered, to inquire what the agreement was. The difficulty was in ascertaining what the terms were. The Master decided as well as he could, and then the cause came on before Lord Rosslyn, upon further directions, who certainly seemed to think Lord Thurlow had gone a great way, and either drove them to a compromise, or refused to go on with the decree upon the principle upon which it was made (*s*).

23. Lord Thurlow, however, appears to have formed a settled opinion upon this point. For in *Allen v. Bower* (*t*), where he considered the written memorandum as evidence of a parol agreement, which was in part performed (whether rightly or not (*u*) is immaterial to the present question), he directed the Master, *who had refused to admit parol evidence*, to inquire and state what the promise was, that was mentioned in the memorandum, and at what time the promise was made, *and what interest the tenant was to acquire in the premises under such promise* ; and the Master was to be at liberty to state specially any particular circumstances that might arise on such inquiries, and the parties were to be examined on interrogatories. In consequence of this order, evidence was received, which proved that the tenant was to hold during his life ; and Lord Thurlow decreed a lease to be executed accordingly.

(*r*) Anon. 5 Vin. Abr. 523, pl. 40 ; and Lord Eldon.

see Anon. *ib.* 522, pl. 38.

(*t*) 3 Bro. C. C. 149.

(*s*) Anon. 6 Ves. jun. 470, cited by

(*u*) See 1 Sch. & Lef. 37.

24. So in a case before Lord Redesdale, where an agreement in writing was held to be within the statute, because the term for which it was to be granted was not expressed, he said, he should have had great difficulty if there were evidence of part-performance. *He must have directed a further inquiry*, for the party had not suggested by his bill, that the agreement was for any specific term, and the case stood both on the pleadings and evidence imperfect *on that head (x). And in a late case before Lord Eldon, he thought the Court must at least endeavor to collect, if they can, what are the terms the parties have referred to (y).

25. But in the case of *Symondson v. Tweed* (z), it was laid down that in all cases wherever the Court had decreed a specific execution of a parol agreement, yet the same had been supported and made out by letters in writing, *and the particular terms stipulated therein*, as a foundation for the decree; otherwise the Court would never carry such an agreement into execution. And in a case before Lord Alvanly, when Master of the Rolls (a), he is reported to have said, "I admit my opinion is, that the Court has gone rather too far in permitting part-performance, and other circumstances, to take cases out of the statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement, but of what, it must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement, but to have had the money laid out repaid. It ought to have been a compensation. Those cases are very dissatisfactory. It was very right to say, the statute should not be an engine of fraud, therefore compensation would have been very proper. They have, however, gone farther, saying, it was clear that there was some agreement, and letting them prove it; but how does the circumstance of having laid out a great deal of money, prove that he is to have a lease of ninety-nine years? The common sense of the thing would have been to have let them bring an action for the money. I should pause upon such a case." And Lord Eldon has said, that perhaps if it was *res integra*, the soundest rule would be, that if the party leaves it uncertain, the agreement

(x) *Clinan v. Cooke*, 1 Scho. & Lel. 22.

(y) *Boardman v. Mostyn*, 6 Ves. jun.

467.

(z) *Prece. Cha.* 374; *Gilb. Eq. Rep.* 35.

(a) *Forster v. Hale*, 3 Ves. jun. 712,

713.

is not taken out of the statute sufficiently to admit of its being enforced (1).

26. In a late case in Ireland, where after a part-performance of a parol agreement the purchaser died, and there was no evidence of the amount of the price agreed on, or of the quantity of estate to be conveyed, Lord Manners refused to grant a reference for the purpose of ascertaining the terms of the contract. There was, he said, no evidence whatever of the terms, and the reference was sought to supply the entire absence of this very material part of the case. Where there is contradictory evidence in a case that raises a doubt in the mind of the Court; that is to say, where the *case is fully proved by the party on whom the onus of proof lay, but that proof shaken or rendered doubtful by the evidence on the other side, there the Court will direct a reference or an issue to ascertain the fact; but where there is no evidence whatever, would it not, he asked, be introducing all the mischiefs intended to be guarded against by the rules of the Court, in not allowing evidence to be gone into after publication, and holding out an opportunity to a party to supply the defect by fabricated evidence, if he were to direct such an inquiry? He therefore did not think himself at liberty from the evidence in the case to direct the reference or issue desired (b).

27. And in a later case (c), a bill for a specific performance was dismissed with costs because the agreement was by parol, and although part performed, the terms of it could not be made out by reason of the variance between the witnesses for the plaintiff.

28. We cannot but observe the growing reluctance manifested to carry parol agreements into execution, on the ground of part-performance, where the terms do not distinctly appear; and although, according to many authorities, the mere circumstance of the terms not appearing, or being controverted by the parties, will not, of itself, deter the Court from taking the best measures to ascertain the real terms (d); yet the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract. We may however remark, that it rarely happens that an agreement cannot be dis-

(b) *Savage v. Carroll*, 1 Ball & Beatty, See *Mundy v. Joliffe*, 9 Sim. 413.

265. See *ibid.* 404, 550, 551.

(d) See *Savage v. Carroll*, 2 Ball &

(c) *Reynolds v. Waring*, You. 346. Beat. 444.

(1) See *Phillips v. Thompson*, 1 John. Ch. 131, cited ante, 140, in note; 4 Kent, (6th ed.) 451; 2 Story, Eq. Jur. §764, §767; *Rowton v. Rowton*, 1 Hen. & Munf. 92; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 281.

tinently proved where the estate is sold. Most of the cases on this head have arisen on leases, where the covenants, &c. are generally left open to future consideration (1).

29. Where a parol agreement is so far executed as to entitle either of the parties to require a specific execution of it, it will be binding on the representatives of the other party in case of his death, to the same extent as he himself was bound by it (e) (2).

30. In a case before Lord Redesdale (f), he held that a contract by a tenant for life with a power of leasing, to grant a lease under his power, was binding on the remainder-man. In the course of the argument, a question was put from the bar, whether, if this had been a case of a parol agreement in part performed, it could be enforced? In answer to which, Lord Redesdale expressed *himself thus: "That, I think, would raise a very distinct question, a question upon the statute of frauds; and perhaps a remainder-man might be protected by the statute, though the tenant for life would not. For the party himself is bound by a part-performance of a parol agreement, principally on the ground of fraud, which is personal. Such a ground could scarcely be made to apply to the case of a remainder-man, unless money had been expended, and there had been an acquiescence after the remainder vested, which were held by Lord Hardwicke, in *Stiles v. Cowper*, 3 Atk. 692, in the case of an actual lease under a power, but with covenants not according to the power, to bind the remainder-man to grant a lease for the same term with covenants according to the power (g).

31. In a case where it was alleged on the one side, that under a parol agreement the purchase-money had been paid and possession delivered; and on the other, that there was no sale, but that possession was delivered to make a qualification, and the alleged

(e) Vide *infra*, ch. 4.

529; *Dowell v. Dew*, 1 You. & Coll. C.

(f) *Shannon v. Bradstreet*, 1 Scho. &

C. 345.

Leif. 52; *Lowe & Swift*, 2 Ball & Beat.

(g) See 2 Sugd. Pow. 141.

(1) "In order," says Mr. Justice Story, "to take a case out of the statute, upon the ground of part performance of a parol contract, it is not only indispensable, that the acts done should be clear and definite, and referrible exclusively to the contract; but the contract should also be established by competent proofs, to be clear, definite, and unequivocal in all its terms. If the terms are uncertain, or ambiguous, or not made out by satisfactory proofs, a specific performance will not (as, indeed, upon principle it should not) be decreed. The reason would seem obvious enough; for a court of equity ought not to act upon conjectures; and one of the most important objects of the statute was to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts." 2 Story, Eq. Jur. §764; *Phillips v. Thompson*, 1 John. Ch. 131, cited ante, 140, in note; *Phyfe v. Wardwell*, 1 Edw. Ch. 51, 52.

(2) See *Grant v. Craigmiles*, 1 Bibb, 203.

purchaser was a mere agent, and both the seller and purchaser were dead; an issue was directed whether the purchaser was, at his death, beneficially entitled to the premises in question (*h*).

32. These remarks may be closed by observing, that equity seems to have been guided by nearly the same rules in compelling a specific performance of parol agreements before the statute (*i*), as have been adhered to since; but still, the student cannot be too cautious in distinguishing the cases which were decided before the statute from those decided subsequently. Much confusion has arisen from inattention to this point.

(*h*) *Burkett v. Randall*, 3 Mer. 466.

(*i*) See *Miller v. Blandist*, Toth. 85; *William v. Nevill*, *ibid.* 135; *Ferne v. Bullock*, *ibid.* 200, 238; *Clark v. Hackwell*, *ibid.* 260; *Simmons v. Cornelius*, 1

Cha. Rep. 128; *Anon.* 2 Freem. 128; *Voll v. Smith*, 3 Cha. Rep. 16; and see *Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 217.

*SECTION VIII.

OF THE ADMISSIBILITY OF PAROL EVIDENCE TO VARY WRITTEN INSTRUMENTS.

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| 1. <i>Parol averments to support a deed.</i> | 32. <i>Negative words of the statute.</i> |
| 2. <i>Parol addition rejected.</i> | 33. <i>Where written agreement correct, parol addition rejected altogether.</i> |
| 5. <i>So of what passed upon the treaty.</i> | 36. <i>Parol evidence of collateral matters, as taxes, &c., rejected.</i> |
| 7, 11. <i>Parol declaration of auctioneer rejected.</i> | 41. <i>Waiver of stipulation for good title rejected.</i> |
| 10. <i>Parol addition also rejected in equity.</i> | 42. <i>Contra in equity.</i> |
| 14. <i>Or to diminish the rent.</i> | 43. <i>Time cannot be waived by parol at law.</i> |
| 18. <i>Unless on behalf of a defendant in equity.</i> | 45. <i>Contra in equity.</i> |
| 20. <i>Where there is fraud.</i> | 46. <i>Parol variation part performed enforced in equity.</i> |
| 21. <i>Or mistake or surprise.</i> | 50. <i>Result as to parol variations.</i> |
| 23. <i>But not to explain the instrument.</i> | 51. <i>Entire agreement for realty and personality.</i> |
| 24, 25. <i>Clowes v. Higginson considered.</i> | |
| 26, 27. <i>Croome v. Lediard considered.</i> | |
| 28. <i>Parol variations after the contract, without consideration, rejected.</i> | |

Of this learning we may treat under three heads, 1st, where there is not any ambiguity in the written instrument; 2dly, where there is an ambiguity; and 3dly, where a term of an agreement is

omitted or varied in the written instrument by mistake or fraud.—And,

1. Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed. Thus, although a valuable consideration was always essential to the validity of a bargain and sale, yet Rolle laid it down that (a) upon *averment* that the deed was in consideration of money, or other valuable consideration given, the land should pass, because the averment was consistent with the deed. The same rule has prevailed since the statute of frauds. Where in a conveyance 2*l.* only were stated to have been received, parol evidence was admitted to prove that 2*l.* more were actually paid (b)(1). And in a later case parol evidence was received, that a sum of money was paid as a premium in order to constitute the relation of *master and apprentice, although no mention of it was made in the written agreement entered into between the parties (c) (2). In all these cases we observe, that the evidence is not offered to contradict or vary the agreement, but to ascertain an independent fact,

(a) 2 Ro. Abr. 786, (N.) pl. 1; and see 1 Rep. 176, a.

(b) *Rex v. the Inhabitants of Scammonden*, 3 Term Rep. 474.

(c) *Rex v. the Inhabitants of Laindon*, 8 Term Rep. 379; and see 2 Cha. Ca. 143; *Tull v. Parlett*, 1 Mood. & Malk. 472.

(1) This was a question of settlement; and the object of the proposed evidence was not to contradict the indenture, but to ascertain an independent collateral fact, namely, whether thirty pounds had been *bona fide* paid, as a consideration for the purchase of the estate, upon which fact the settlement would depend. 1 Phil. Ev. (4th Am. ed.) 551; 1 Greenl. Ev. §285. It is remarked by the learned editors of Phil. Ev. Part. 2 p. 1414, in note, 965, that "a more obvious ground for the decision in *Rex v. Scammonden*, cited in the text, is, that the party offering the evidence was a stranger to the deed; and, as such, had a right to avail himself of the truth, independent of any conventional arrangements of the parties. In this light it has been generally viewed, both in England and in the United States. See *Gresley Eq. Ev.* 201; 2 Stark. Ev. (6th Am. ed.) 575; Per Taylor J. in *Brooks v. Maltbie*, 1 Stewart & Porter, 103; Per Huntington J. in *Johnson v. Blackman*, 11 Conn. 351, 352, 353; *Berlin v. Norwich*, 10 John. 229, 230; *Reading v. Weston*, 8 Conn. 117.

(2) If no consideration is expressed in a written agreement, or it purports to have been made on divers good considerations, the true consideration may be proved *aliunde*. *Arms v. Ashley*, 4 Pick. 71; *Tingley v. Cutter*, 7 Conn. 291; *Cummings v. Demett*, 26 Maine, 397; *White v. Weeks*, 1 Penns. 486; *Davenport v. Mason*, 15 Mass. 85; *Hartley v. M'Anulty*, 4 Yeates, 25; *Stevens v. Grif-fith*, 3 Vermont, 448; *Jones v. Sasser*, 1 Dev. & Batt. 466.

But it has been held, that where a consideration is set forth, evidence is not admissible to show that a greater or a different consideration was intended. *Schermerhorn v. Vanderheyden*, 1 John. 139; *Maigley v. Hauer*, 7 John. 341; *Howes v. Barker*, 3 John. 506; *Emery v. Chase*, 5 Greenl. 232; *Winchell v. Latham*, 6 Cowen, 690. Unless the words, "for other considerations," or equivalent words are used. *Maigley v. Hauer*, 7 John. 341; *Benedict v. Lynch*, 1 John. Ch. 370. See also *Elliot v. Giese*, 7 Harr. & John. 457; *Leonard v. Vredenburg*, 8 John. 29; *Hyne v. Campbell*, 6 Monroe, 291; *Miller v. Bagwell*, 3 M'Cord, 568; *Mead v. Steger*, 5 Porter, 506. This, however, is not the settled rule upon the subject. The cases have been materially conflicting. And in reference to the consideration clause in a deed

which is consistent with the deed, and which it is necessary to ascertain, with a view to effectuate the real intention of the parties (*d*) (1).

2. It is, however, clearly settled, that parol evidence is not admissible to disannul and substantially vary a written agreement; for, as Lord Hardwicke observes, to add anything to an agreement in writing by admitting parol evidence, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before that statute was in being (*e*) (2).

3. Thus, in a leading case on this subject (*f*), it appeared that

(*d*) *Rex v. Inhabitants of Wickham*, 2 Adol. & Ell. 517.

(*e*) *Parteriche v. Powlet*, 2 Atk. 383; and see *Tinney v. Tinney*, 3 Atk. 8; *Binstead v. Coleman*, Bunb. 65; *Hogg v. Snaith*, 1 Taunt. 347.

(*f*) *Meres v. Ansell*, 3 Wils. 275; and see *Mease v. Mease*, Cowp. 47; *Lofft*, 457; *Cuff v. Penn*, 1 Mau. & Selw. 21; *Greaves v. Ashlin*, 3 Camp. Ca. 426; *Hope v. Atkins*, 1 Price, 143.

acknowledging the receipt thereof, Mr. Justice Cowen, after having examined and discussed many of the leading authorities in England and in the United States, in the case of *M'Crea v. Purmort*, 16 Wendell, 460, 475, says in conclusion: "Looking at the strong and overwhelming balance of authority, as collected from the decisions of the American Courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end and that alone is it conclusive. Such effect I have no doubt has long been ascribed to it by conveyancers and dealers in real estate. It is a construction, which violates no rule of law, but harmonizes with well settled principles, and should be steadily maintained and applied whenever the ends of substantial justice may require it." See *Shepherd v. Little*, 14 John. 210; *Bowen v. Bell*, 20 John. 338; *Wilkinson v. Scott*, 17 Mass. 249; *Goodwin v. Gilbert*, 9 Mass. 510, 514; *Bullard v. Briggs*, 7 Pick. 533; *Griswold v. Messenger*, 6 Pick. 517; *Whitbeck v. Whitbeck*, 9 Cowen, 266; *Sinclair v. Jackson*, 8 Cowen, 543; *Watson v. Blaine*, 12 Serg. & Rawle 131; *Belden v. Seymour*, 8 Conn. 304; *Morse v. Shattuck*, 4 N. Hamp. 229; *Schillinger v. McCann*, 6 Greenl. 364; *O'Neal v. Lodge*, 3 Harr. & M'Hen. 433; *Cummings v. Dennett*, 26 Maine, 397; *Linseott v. McIntire*, 15 Maine, 201. In *Belden v. Seymour*, 8 Conn. 304, Daggett J. held that the only operation of the clause in a deed regarding the consideration, is, to prevent a resulting trust in the grantor, and to estop him forever to deny the deed for the uses therein mentioned. See *Higdon v. Thomas*, 1 Harr. & Gill, 139, 145; *Lingan v. Henderson*, 1 Bland Ch. 249; *Hutchinson v. Sinclair*, 7 Monroe, 291, 293; *Curry v. Syles*, 2 Hill Ch. 404; *Steele v. Worthington*, 2 Ham. 182, 186, 187; *Swisher v. Swisher*, Wright, 755, 756; *Harvey v. Alexander*, 1 Rand. 219; *Brown v. Maltbie*, 4 Stew. & Porter, 96; *Byers v. Mullen*, 9 Watts, 266; *Lazell v. Lazell*, 12 Vermont, 443; 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, Ch. 2, §38, note, Ch. 20, §52 note, 4 vol. pp. 23, 24, 253.

In reference to the admissibility of parol testimony respecting the consideration of an agreement or deed, much must depend on the purpose for which, and the parties between whom, the testimony is offered. *Morse v. Shattuck*, 4 N. Hamp. 229, 231, 232; Part 1 Cowen & Hill's Notes to Phil. Ev. p. 215, in note 194; Part 2 ib. p. 1441, in note 964, p. 1448, in note 969; *Henderson v. Dodd*, 1 Bailey Eq. 138; *Kinzie v. Penrose*, 2 Scammon, 516; *Nixon v. Hamilton*, 2 Dru. & W. 364; S. C. 1 Irish Eq. 55.

(1) See 1 Greenl. Ev. §285; *Clifford v. Turrill*, 9 Jurist, 633; *Lobb v. Stanley*, 5 Adol. & Ell. N. S. 574; 1 Phil. Ev. (4th Am. ed.) 549 to 551.

(2) 1 Greenl. Ev. §275; *Stackpole v. Arnold*, 11 Mass. 30, 31, Per Parker J.; *McLellan v. Cumberland Bank*, 24 Maine, 566; *Irnham v. Child*, 1 Brown C. C. (Perkins's ed.) 92 to 95 in notes; *Rich v. Jackson*, 4 ib. 514 and notes; 1 Phil. Ev. (4th Am. ed.) 547, et seq. 559, 561 and notes; *Portmore v. Morris*, 2 Brown C.

by an agreement in writing, the grass and vesture of hay from off a close of land, called Boreham Meadow, were to be taken by one Ansell. The subscribing witness to the agreement proved the written agreement, and he and another person deposed, that it was at the same time (when the written agreement was made) agreed by the parties by *parol*, that Ansell should not only have the hay from off Boreham Meadow, but also the possession of the soil and produce of that and another close of land. The cause was tried at *nisi prius* before Lord Mansfield, who admitted the evidence, and afterwards reported that he was not dissatisfied with the verdict in consequence of it. But Lord Chief Justice De Grey, and the other Judges of the Court of Common Pleas, held clearly, that the evidence was inadmissible, as it annulled and substantially altered and impugned the written agreement.

4. So in *Preston v. Merceau* (g), by an agreement in writing a house was let at 26*l.* a year; and the landlord attempted to show, by *parol* evidence, that the tenant had agreed to pay the ground-rent for the house to the original landlord, over and above the 26*l.* a year; but the Court of Common Pleas rejected the evidence.

5. In a late case in the King's Bench, the Chief Justice, in delivering the opinion of the Court, observed, that by the general rules of the common law, if there be a contract which has been *reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract (1). But after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written

(g) 2 Blackst. 1249.

C. (Perkins's ed.) 218, and notes; *Woollam v. Hearn*, 7 Vesey Jr. (Sumner's ed.) 211 and notes; *Per Wilde J. in Cummings v. Arnold*, 3 Metcalf, 489.

(1) 1 Greenl. Ev. §275; Part 2 Cowen & Hill's notes to Phil. Ev. p. 1467 in note 984, and numerous cases there cited.

agreement (*h*) (1). But this refers only to an agreement at common law (2).

6. And in an earlier case (*i*), the Lord Chief Baron observed, that the foundation of the rules for rejecting parol evidence is in the general rules of evidence, in which writing stands higher in the scale than parol testimony, and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Indeed, nothing was so familiar as this idea. At *nisi prius*, where an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so, there is an end of all parol evidence; for when parties express their meaning with solemnity, that is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, this general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing, and that therefore is a further reason for rejecting the parol evidence. In this way only is the statute of frauds material, for the foundation and bottom of the objection is in the *general* rules

(*h*) *Goss v. Lord Nugent*, 2 Nev. & the latter part; see pl. 19, *post*.
Man. 33, 34; 5 Barn. & Adol. 65; *sed qu.* (*i*) *Davis v. Symonds*, 1 Cox, 402.

(1) *Cummings v. Arnold*, 3 Metcalf, 489 Per Wilde J.; 1 Greenl. Ev. §302, §303; *Chitty Contr.* (8th Am. ed.) 105, 106, and notes; *Brewster v. Countryman*, 12 Wendell, 446; *Dearborn v. Cross*, 9 Cowen, 48; *Richardson v. Cooper*, 25 Maine, 450, 452; *Howard v. Wilmington and Susq. Rail Road, Co.* 1 Gill, 311; *Richardson v. Hooker*, 13 Pick. 446; *Monroe v. Perkins*, 9 Pick. 298; *Rogers v. Atkinson*, 1 Kelley, 12; *Neil v. Cheves*, 1 Bailey, 537; *Franklin v. Long*, 7 Gill & John. 407; *Delacroix v. Bulkey*, 13 Wendell, 71; *Vicary v. Moore*, 2 Watts, 456, 457; *Watkins v. Hodges*, 6 Harr. & John. 28; *Broek v. Sturdivant*, 3 Fairf. 81; *Clement v. Durgin*, 5 Greenl. 9; *Marshall v. Baker*, 19 Maine, 402. The alteration of a sealed contract by parol makes it all parol. *Vicary v. Moore*, 2 Watts, 421, 456, 457. See *Mill Dam Foundry v. Hovey*, 21 Pick. 417. In order to render the parol variation available, the action should be grounded on the subsequent agreement, with which the specialty is, in such cases, considered as incorporated. *Vicary v. Moore*, 2 Watts, 451, 456, 457; *Mead v. Degolyer*, 16 Wendell, 635; *Baird v. Blairgrove*, 1 Wash. 170; *Langworthy v. Smith*, 2 Wendell, 587; *Marks v. Robinson*, 1 Bailey, 89; *Cox v. Bennett*, 1 Greenl. 165; *Mill Dam Foundry v. Hovey*, 21 Pick. 417; *Monroe v. Perkins*, 9 Pick. 298; *Lattimore v. Harsen*, 14 John. 330; *Dearborn v. Cross*, 7 Cowen, 48; *Fleming v. Gilbert*, 3 John. 358; *LeFevre v. LeFevre*, 4 Serg. & R. 241.

(2) The terms of a written contract for the sale of goods within the statute of frauds may be varied by a subsequent parol contract, which is not within the statute of frauds. *Cummings v. Arnold*, 3 Metcalf, 486. See 1 Greenl. Ev. §302. But see *Blood v. Goodrich*, 9 Wendell, 68; *Chitty Contr.* (8th Am. ed.) 106. The case of *Cummings v. Arnold*, was a suit for breach of a written agreement to manufacture, and deliver weekly to the plaintiff, a certain quantity of cloth, at a certain price per yard, on eight months' credit, and it was held that the defendant might give in evidence, as a good defence, a subsequent parol agreement between him and the plaintiff, made on a legal consideration, by which the terms of payment were varied, and that the plaintiff had refused to perform the parol agreement. See *Harvey v. Grabham*, 5 Adol. & Ell. 61, 74; *Marshall v. Lynn*, 6 Mees. & Welsb. 109.

of evidence. He took the rule to apply in every case where the question is, *what is the agreement?*

7. And upon the general rule of law, independently of the statute of frauds, it has been determined that verbal declarations by an auctioneer in the auction-room, contrary to the printed conditions of sale, are inadmissible as evidence, unless perhaps the purchaser has particular personal information given him of the mistake in the particulars (*k*) (1).

*8. In a late case (*l*), upon the sale of timber by a written particular, which was silent as to the quantity, it was attempted to show that the auctioneer verbally warranted the quantity to be eighty tons, and it was insisted that this evidence was admissible, because it did not *contradict* the particular, but merely supplied its defect in not stating the quantity. But it was held that the evidence was not admissible (2). Lord Ellenborough said, that the purchaser ought to have had it reduced into writing at the time, if the representation then made as to the quantity swayed him to bid for the lot. If the parol evidence were admissible in this case, he knew of no instance where a party might not, by parol testimony, superadd any term to a written agreement, which would be setting aside all written contracts, and rendering them of no effect. There was no doubt, he added, that the warranty as to the quantity of timber would not vary the agreement contained in the written conditions of sale.

9. So, since the Act of Parliament for altering the style, a demise from Michaelmas must be taken to be from new Michaelmas, and parol evidence cannot be admitted to show that the parties intended it to commence at old Michaelmas (*m*), unless the demise is by parol (*n*) (3).

10. The rules of evidence are universally the same in courts of law and equity. Therefore parol evidence, which goes to substan-

(*k*) *Gunniss v. Erhart*, 1 H. Blackst. 289. See 13 Ves. jun. 471, and *infra*; and *Fife v. Clayton*, 13 Ves. jun. 546; *Higginson v. Clowes*, 15 Ves. jun. 516; *supra*, p. 22.

(*l*) *Powell v. Edmunds*, 12 East, 6; *Jones v. Edney*, 3 Camp. Ca. 285.

(*m*) *Doe v. Lea*, 11 East, 312; see *Ford v. Yates*, 2 Mann. & Grang. 549.

(*n*) *Doe v. Benson*, 4 Barn. & Ald. 588.

(1) Ante, 22; *Wright v. Deklyne*, Peters C. C. 199; *Morton v. Waldryn*, Prec. Dec. 137; 1 Phil. Ex. (4th Am. ed.) 560; *Wainwright v. Read*, 1 Desaus. Eq. 573; *Pew v. Livalais*, 3 Miller (Louis.) 459; *Livingston v. Byrne*, 11 John. 555; *Carmon v. Mitchell*, 2 Desaus. 320.

(2) See *Wright v. Deklyne*, 1 Peters C. C. 199, 204; *Wainwright v. Read*, 1 Desaus. 573.

(3) See *Wilcox v. Wood*, 9 Wendell, 346.

tially alter a written agreement, cannot be received in a court of equity any more than in a court of law (o) (1).

11. Thus in a case of *Lawson v. Laude* (p), a bill was brought to carry into execution an agreement between the plaintiff and defendant, for granting to the defendant a lease of a farm. The defendant objected to execute the lease, because some land called Oxlane, agreed to be demised, was left out of the lease. The plaintiff offered evidence to prove, that it was left out by the particular and joint direction of the plaintiff and defendant. Sir Thomas Clarke held the evidence to be in direct contradiction to the statute of frauds, and therefore dismissed the bill.

12. So in a case before Lord Bathurst (q), the bill was filed for an injunction to stay proceedings at law for a breach of covenant, in not assigning *all* the premises, which the defendant insisted, by *an agreement in writing, and a lease in pursuance of it, were to be assigned. The plaintiff stated by his bill, that though the agreement was for *all* the premises, yet the defendant at the time of the execution of the lease, agreed that three pieces of land should be excepted, and the plaintiff examined several witnesses to prove the fact, which they did; but the defendant by his answer denied the fact, and insisted upon the extent of the written agreement; and the parol evidence being objected to at the hearing, it was not permitted to be read.

13. Neither can it be proved by parol evidence that an agreement to sell to two jointly, was really a contract with one only, and the other was to have a security for the money he might advance; for that would contradict the written agreement (r).

14. And in an important case before Lord Eldon (s), he refused to execute an agreement with a variation attempted to be intro-

(o) See 3 Wils. 276; and see *Foot v. Salway*, 2 Cha. Ca. 142.

(p) 1 Dick. 346.

(q) *Fell v. Chamberlain*, 2 Dick. 484. I could not meet with the facts in the Registrar's book; see Reg. Lib. A. 1772, fol. 1. 496.

(r) *Davis v. Symonds*, 1 Cox, 402. [See *Jenkins v. Eldredge*, 3 Story C. C. 181.]

(s) *Marquis of Townsend v. Stangroom*, 6 Ves. jun 328. [Sumner's ed. 328 note (a)]. See 1 Ves. & Bea. 526, 527; 2 Dru. & War. 232.

(1) *Chitty Contr.* (8th Am. ed.) 97 and notes; 1 Phil. Ev. (4th Am. ed.) 567, et seq.; 2 Story Eq. Jur. §767 et seq. §1531; *Dwight v. Pomeroy*, 17 Mass. 303; *Bradbury v. White*, 4 Greenl. 394; *Stevens v. Cooper*, 1 John. Ch. 429; *Movan v. Hays*, 1 John. Ch. 339; *Steere v. Steere*, 5 John. Ch. 1; *Church v. Church*, 4 Yeates, 280; *Harrison v. Talbot*, 2 Dana, 258, 259; *Timberlake v. Parish*, 5 Dana, 350, 351, 352; *Brown v. Haven*, 3 Fairf. 179; *Holmes v. Simons*, 3 Desaus. 149, 152; *Dupree v. McDonald*, 4 Desaus. 209; *Tilton v. Tilton*, 9 N. Hamp. 392, Per Wilcox J.; *Eveleth v. Wilson*, 15 Maine, 109; *Richardson v. Thompson*, 1 Humph. 151; *Chetwood v. Brittan*, 1 Green Ch. 439.

duced by parol, on the ground of mistake, or at least of surprise, which was denied by the answer. So in the late case of *Woollam v. Hearn* (*t*), where a specific performance was sought of an agreement for a lease, at a less rent than that mentioned in the agreement, which variation was introduced by parol, on the ground of fraud and misrepresentation in the landlord; the evidence was read without prejudice, and the Master of the Rolls thought it made out the plaintiff's case; but he held himself bound by the authorities, and accordingly rejected the evidence, and dismissed the bill. And this doctrine has been distinctly recognized by Lord Redesdale (*u*) (*1*).

15. So verbal declarations, in opposition to printed conditions of sale, are inadmissible as evidence in equity as well as at law (*x*).

(*t*) 7 Ves. jun. 211. [Sumner's ed. 330, cited; 15 Ves. jun. 521; 1 Ves. & Bea. 528; see 15 Ves. jun. 171, 546; note (*b*)].

(*u*) 1 Scho. & Lef. 39.

Higginson v. Clowes, 15 Ves. jun. 516.

(*x*) *Jenkinson v. Pepys*, 6 Ves. jun.

(1) See *Westbrook v. Harbeson*, 2 M'Cord Ch. 115; *Ward v. Ledbetter*, 1 Dev. & Batt. 496; *Gresley Eq. Ev.* 205, 207. In *Gillespie v. Moon*, 2 John. Ch. 585, it was held, by Mr. Chancellor Kent, that equity will relieve against a mistake, as well as against a fraud, in a deed or contract in writing; and parol evidence is admissible to prove the mistake, though it is denied in the answer; and this, either where the plaintiff seeks relief affirmatively, on the ground of the mistake, or where the defendant sets it up as a defence, or to rebut an equity. The same doctrine was maintained by the same high authority in *Keisselbrack v. Livingston*, 4 John. Ch. 144. The evidence in such case must be clear and strong, so as to establish the mistake to the entire satisfaction of the court. *Gillespie v. Moon*, 2 John. Ch. 585; *Tilton v. Tilton*, 9 N. Hamp. 392, 393. Where there was an agreement to execute a lease for lives, "containing the usual clauses, restrictions, and reservations, contained in leases given by the defendant," it being necessary to resort to proof *dehors* the agreement, to ascertain what were the usual clauses, &c. in such a lease; it was held to be open to the plaintiff, also to show by parol that it was agreed and understood, in the time, that a particular reservation was not to be inserted in the lease, which the defendant was to execute. *Keisselbrack v. Livingston*, 4 John. Ch. 144. The court said, the statute of frauds had no bearing on the case, *ib*.

Mr. Justice Story, in 1 Story Eq. Jur. §161, discusses this subject and seems fully to agree with Mr. Chancellor Kent, in the above doctrines. See also in support of the same, *Tilton v. Tilton*, 9 N. Hamp. 391—393; *Langdon v. Keith*, 9 Vermont, 290; *Cleveland v. Burton*, 11 Vermont, 138; *Hunt v. Rousmanier*, 8 Wheaton, 211; *S. C. 1 Peters*, 13; *Wesley v. Thomas*, 6 Harr. & John. 21; *Newsom v. Bufferlow*, 1 Dev. Eq. 379; *Gower v. Sterner*, 2 Wheaton, 75, 79; *Abbe v. Goodwin*, 7 Conn. 377; 1 Phil. Ev. (4th Am. ed.) 570 to 575; *Inskoe v. Proctor*, 6 Monroe, 316; *Lyman v. United Ins. Co.* 2 John. Ch. 630; 1 Arnould Ins. (Perkins's ed.) 51 note; *Pember v. Mathers*, 1 Brown C. C. (Perkins's ed.) 52, 54 and note; *Iruham v. Child*, *ib.* 92, 95, and notes; *Rich v. Jackson*, 4 *ib.* 514 and note; *Jordan v. Lawkins*, *ib.* 477, 478, note (*a*).

The power of a court of equity of general jurisdiction to reform or rectify contracts is not within the equity jurisdiction of the Supreme Court of Massachusetts. *Leach v. Leach*, 18 Pick. 68; *Dwight v. Pomeroy*, 17 Mass. 303; *Babcock v. Smith*, 22 Pick. 61, 70.

But the correction of a mistake in a deed is within the equity powers of the Court in Maine, *Peterson v. Grover*, 20 Maine, 363. So in New Hampshire, *Tilton v. Tilton*, 9 N. Hamp. 392; Vermont, *Langdon v. Keith*, 9 Vermont, 299. See *Elder v. Elder*, 1 Fairf. 80.

16. And if a material term be added by one party to a written agreement after its execution, he destroys his own rights under the instrument. But although this doctrine has been referred to the statute of frauds, yet it seems rather to depend on the principles of the common law (y) (1).

17. In the late case of *Besant v. Richards* (z), where the purchaser was plaintiff, the contract described the property as held by one Watson, and the sale was to be completed at Michaelmas. Watson held an agreement for a lease for ten years, but the seller represented to the purchaser that this agreement was void, and that he *had served Watson with notice to quit at Michaelmas, and that he would give possession at that time. The tenant refused to quit, and the Master of the Rolls held that the purchaser ought not to be bound by the agreement, purchasing as he did on the faith of that representation. He was entitled to be released from the agreement altogether, or if he chose he might perform it and have compensation, and the plaintiff electing to take the agreement with a compensation, a decree was made accordingly; but it seems difficult to sustain this decision consistently with the authorities, although there might have been sufficient ground to have released the purchaser altogether.

18. But when equity is called upon to exercise its peculiar jurisdiction, by decreeing a specific performance, *the party to be charged* is to be let in to show, that, under the circumstances, the plaintiff is not entitled to have the agreement specifically performed (a) (2).

(y) *Powell v. Divett*, 15 East, 20.

(a) See 7, Ves. jun. 219.

(z) *Tamlyn*, 509.

(1) See this subject fully considered in *Chitty Contr.* (8th Am. ed.) 677 to 680 and in notes.

(2) See the cases cited in note to ante p. 156; *Ellis v. Burden*, 1 Alabama (N. S.) 458; *Miller v. Chetwood*, 1 Green Ch. 199. In 1 Phil. Ev. (4th Am. ed.) 568, it is said that "the statute of frauds has not altered the situation of a defendant, against whom a specific performance is prayed; and he may give the same evidence now, which he might have given before." *Clark v. Grant*, 14 Vesey (Sumner's ed.) 519, 524; Per Sir Wm. Grant, Master of the Rolls. See the suggestions upon this point by Mr. Justice Wilde, in *Cummings v. Arnold*, 3 Metcalf, 490, 491; 2 Story Eq. Jur. §770. It is further said in 1 Phil. Ev. 569, that "the general principle, to be deduced from the various authorities on this subject, appears to be, that a defendant, in answer to a bill for a specific performance, may suggest, and prove by parol evidence, that, by reason of fraud, surprise, or mistake, the written instrument does not correctly and truly express the agreement, but that there is an omission or insertion of a term, or some material variation, contrary to the intention and understanding of the parties." See *Woollam v. Hearn*, 7 Vesey (Sumner's ed.) 211 note (a) and cases cited; *Irlham v. Child*, 1 Brown C. C. (Perkins's ed.) 92, 93 note and cases cited; 2 Story Eq. Jur. §769, §779; *Kendall v. Almy*, 2 Sumner, C. C. 278; *King v. Hamilton*, 4 Peters S. C. 311; *Cathcart v. Robinson*, 5 ib. 264; 2 Pt. Phil. Ev. (Cowen & Hills' notes),

19. For the rule applies no further than this precise question, *What* is the agreement? Where the question is, what were the collateral circumstances attending the agreement? they may be proved by parol evidence. If any of these collateral circumstances are reduced into writing, the same rule applies to them as to the original agreement; but if not, both at law and in equity such collateral circumstances may be proved by parol; for example, duress at law, fraud and circumvention in equity. When it is said that parol evidence shall not *affect* written instruments, the vice of the argument turns upon the use of the word "*affect*;" for if it means to *vary it*, it is true, and if it is to be carried beyond that meaning it is not true; there is nothing so clear as the jurisdiction of the court to *affect* a written instrument by parol testimony: the courts of law do it every day, and in truth set them aside; courts of equity do it on other grounds, and take a larger field (*b*).

20. Therefore a defendant resisting a specific performance of an agreement, may prove by parol evidence, that by fraud the written agreement does not contain the real terms (*c*)(1). Such evidence was admitted by Lord Hardwicke in *Joynes v. Statham* (*d*); and in the case of *Woollam v. Hearn* (*e*), before cited, the Master of the Rolls said, that if it had been a bill brought by the defendant for a specific performance, he should have been bound by the decisions to admit the parol evidence, and to refuse a specific performance.

*21. So Lord Hardwicke admitted, that an omission by mistake or surprise, would let in the evidence as well as fraud; and Lord Eldon actually admitted parol evidence of surprise, as a defence to a bill seeking a performance in specie; but he said, that those producing evidence of mistake or surprise, in opposition to a specific performance, undertake a case of great difficulty (*f*). In a later case, the Master of the Rolls admitted parol evidence on behalf of a defendant, to show a parol promise at the time of signing the agreement to vary the terms of it, and upon the evidence he dis-

(*b*) *Per* Ld. C. Baron, *Davis v. Symonds*, 1 Cox, 405, 407.

(*c*) See the cases cited *infra*, as to discharging or varying a written agreement by parol; and see *Walker v. Walker*, 2 Atk. 98; and see 6 Ves. jun. 334, n.

(*d*) 3 Atk. 388.

(*e*) 7 Ves. jun. 211. [Sumner's ed. note (*a*)].

(*f*) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328. [See Sumner's ed. notes].

1484, note, 996 and cases cited; *Ward v. Ledbetter*, 1 Dev. & Bat. Eq. 496; *Westbrook v. Harbeson*, 2 M'Cord Ch. 115; *Wood v. Lee*, 5 Monroe, 57.

(1) *Best v. Stow*, 2 Sandford, 298, 300; *Dwight v. Pomeroy*, 17 Mass. 303, 328; *Brooks v. Wheelock*, 11 Pick. 439, 440.

missed the bill for a specific performance of the written agreement (*g*).

22. So where by the *mistake* of the solicitor the agreement only required the purchaser to bear the expense of the conveyance, whereas the real agreement was, that he should also bear the expense of making out the title, the Master of the Rolls admitted parol evidence of the real agreement and of the mistake (1); and upon the strength of it, he gave the plaintiff, the purchaser, his option to have his bill, which was for a specific performance according to the terms of the written agreement, dismissed, or to have the agreement performed in the way contended for by the seller (*h*).

23. But in a case before Sir W. Grant, where an estate was sold in lots, and at the end of some of the lots only it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance, requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was of course rejected. But the Master of the Rolls

(*g*) *Clarke v. Grant*, 14 Ves. jun. 519. [Sumner's ed. notes] and see 15 Ves. jun. 523.

(*h*) *Ramsbottom v. Gosden*, 1 Ves. & Beam. 165. See *Flood v. Finlay*, 2 Ball

& Beatty, 9; *Lord William Gordon v. Marquis of Hertford*, 2 Madd. 106; *Garrard v. Girling*, 1 Wils. Ch. Cas. 460; 2 Swanst. 244.

(1) See *Gower v. Sterner*, 2 Whart. 75; *Gillespie v. Moon*, 2 John. Ch. 585; *Christ v. Dffenbach*, 1 Serg. & R. 464; *Miller v. Henderson*, 10 Serg. & R. 292; *Stevens v. Cooper*, 1 John. Ch. 429; *Lemater v. Buckhart*, 2 Bibb, 28; *Wesley v. Thomas*, 6 Harr. & John. 24; *Jones v. Sluby*, 5 Harr. & John. 372.

Parol evidence has been held admissible to show, that a deed absolute upon its face was really intended as a mortgage, or that the defeasance has been destroyed by fraud or mistake. *Marks v. Pell*, 1 John. Ch. 594; *Strong v. Stewart*, 4 John. Ch. 167; *James v. Johnson*, 6 John. Ch. 417; *Clark v. Henry*, 2 Cowen, 324; *Whittick v. Kane*, 1 Paige, 206; *Washburn v. Merrill*, 1 Day, 139; *Murphy v. Tripp*, 1 Monroe, 73; 2 Story Eq. Jur. §768, §1018; *Irnham v. Child*, 1 Brown C. C. (Perkins's ed.) 93, in note to this point; *Reading v. Weston*, 8 Conn. 117, 120—122; *Van Buren v. Obnstead*, 5 Paige, 9; *Stewart v. Hutchins*, 13 Wendell, 485; *May v. Eastin*, 2 Porter, 411; *Green v. Bonnell*, 1 Green Ch. 264; *Blanchard v. Keaton*, 4 Bibb, 451; *Todd v. Rivers*, 1 Desaus. 155; *Ross v. Nowell*, 1 Wash. 14; *King v. Newman*, 2 Munf. 40; 1 Cruise Dig. by Mr. Greenleaf, Tit. 15, Ch. 1, §20, in note; *Fonbl. Eq. Bk. 1, Ch. 3, §11, p. 200* in note.

Where a deed is absolute in its terms, but the grantor claims it to be in truth only a mortgage, the burthen of proof is on him, to show the real intent of the parties, and that the present form of the transaction arose from ignorance, accident, mistake, fraud, or undue advantage taken of his situation. *McDonald v. McLeod*, 1 Iredell Eq. 221; *Lewis v. Owen*, ib. 291.

But in Massachusetts, Maine, and New Hampshire, parol evidence seems to be regarded as inadmissible to vary the terms of an absolute deed so as to make of it a mortgage. See *Flint v. Sheldon*, 13 Mass. 443; *Bodwell v. Webster*, 13 Pick. 411, 413; *Erskine v. Townsend*, 2 Mass. 493; *Whitaker v. Sumner*, 20 Pick. 404; *Hale v. Jewell*, 7 Greenl. 435; *French v. Sturdivant*, 8 Greenl. 250, 251; *Lund v. Lund*, 1 N. Hamp. 39.

said he desired not to be understood as delivering any opinion whether, supposing these plaintiffs had been defendants, the evidence would or would not be admissible, but his opinion was, that clearly upon the part of a plaintiff seeking performance, it could not be received (i). The purchaser then filed a bill against the seller for a specific performance, according to his construction that he was to pay for the timber on the lots only to which a stipulation to that effect was added. The seller, *as defendant*, offered parol evidence of the declaration by the auctioneer. The Vice-Chancellor, *Sir T. Plumer, agreed that fraud would let in the evidence as a defence. He added, that upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain or alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust, and therefore not conformable to the principles upon which a court of equity exercises this jurisdiction. There was, however, considerable difficulty in the application of evidence under this head, calling for great caution, particularly upon sales by auction, lest under this idea of introducing evidence of mistake, the rule should be relaxed, by letting it in to explain, alter, contradict, and in effect, get rid of a written agreement. In sales by auction, the real object, he said, of introducing declarations by auctioneers or other persons, is to explain, alter, or contradict the written agreement, in effect to substitute another contract ; and, independent of authority, he should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, *whether offered by a plaintiff seeking a performance, or by a defendant to get rid of the contract*, a distinction which it was difficult to adopt, where the evidence is introduced to show that the writing purporting to be a contract is not the contract ; that there is no contract between them if that which was proved by parol did not make a part of it. That does not depend upon the principle on which a defendant is permitted to show fraud, mistake, or surprise, collateral to and independent of the written contract, the object in the other case being to get rid of the contract by explaining it away. He did not recollect any instance that evidence offered in that view had been received, but there were cases in which it had been rejected ; and he referred to *Jenkinson v. Pepys*, without noticing the dis-

(i) *Higginson v. Clowes*, 15 Ves. jun. 516.

unction that there the parol evidence was offered by the plaintiff, and admitted that in *Ramsbottom v. Gosden* the parol evidence seemed to have had the effect, in some degree, of altering the written contract ; but if the evidence there offered could fairly be brought under the head of mistake, that did not infringe upon the principle that parol evidence of fraud, mistake, or surprise, might be received as a defense. But no authority having decided that evidence could be received, except upon one of those grounds, and the declarations in this case being offered where the parties had contracted in writing upon a subject distinctly adverted to in their written contract, which made a provision for it (whether explicit and satisfactory was not material), the evidence of these declarations, he said, must be rejected, because there was no fraud, mistake, or *surprise, and the evidence was offered to contradict, explain, or vary the written contract (*k*).

24. This judgment does not seem to be warranted by the principles of the Court. It is manifest that the learned judge was disposed to overrule the settled distinction. It is not necessary, in order to render the evidence admissible, that its object should be to show fraud, mistake, or surprise, collateral to or independent of the written contract, although that usually is its tendency ; but the evidence is admissible where, by way of defense, the object is to get rid of the contract, by showing that it is not the contract really entered into by the parties, although where, even as a defense, the evidence is used to show that the terms of the contract are not the real ones, the evidence, when admitted, must be very powerful to induce the Court to believe that the terms expressed are not the real ones. In *Ramsbottom v. Gosden*, as the contract was silent as to the expense of making out the title, that of course would have fallen on the vendor ; but that was a mistake, and contrary to the real contract, and parol evidence really to contradict the written agreement on this head was admitted as a defense.

25. So where lands, which upon admeasurement did not contain thirty-six acres, were described in a particular to contain forty-one acres by estimation, were the same more or less, and the purchaser, in answer to a bill for a specific performance, set up parol declarations of the auctioneer that he sold it for forty-one acres, and if it was less, an abatement should be made, the Master

(*k*) *Clowes v. Higginson*, 1 Ves. & Bea. 2 My. & Kee. 251. 524 ; see and consider *Croome v. Lediard*,

of the Rolls, Sir W. Grant, admitted the evidence and dismissed the bill, because, after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller to insist upon the execution of the contract, not giving the defendant the benefit of that declaration (*l*). And yet the subject was distinctly adverted to in the written contract, and indeed the provision was free from ambiguity, and the parol evidence *contradicted* it; whereas, in *Clowes v. Higginson*, there was an ambiguity—two statements, which might be considered at variance with each other—which the parol evidence would have *explained*. The evidence, it is submitted, in the latter case, was admissible in equity as a defense, simply on the ground that the plaintiff, who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

*26. Yet in a later case (*m*), where there was a contract by each of two persons to buy an estate of each other, both estates to be valued by the same person, and both purchases to be completed on the same day; the case was a peculiar one, but it was decided that the contracts were distinct, although contained in the same paper, and notwithstanding the difference between having to pay for one estate with the price of another, and having to retain your own estate and yet to pay for another; and it was held by the Master of the Rolls, Sir John Leach, that no evidence *aliunde* could be received to give a construction to the agreement contrary to the plain import of those expressions, and he therefore rejected evidence tendered by the defendant to show that the real intention was to exchange the estates; and Lord Brougham, upon appeal, without hearing the respondent's counsel, affirmed the decree. Parol evidence of matter collateral to the agreement might, he said, be received; but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract. In the present case, the purpose for which the parol evidence was tendered on the part of the defendant was, not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange, a circumstance which, if true, was totally at variance with the language and plain import of the instrument. Nothing could be more dangerous than to admit such evidence; for, if the agreement between the parties were in fact conducted

(*l*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*m*) *Croome v. Lediard*, 2 Myl. & Kee. 251.

upon the basis of an exchange, why was the instrument so drawn as to suppress the real nature of the transaction ?

27. The decision in the above case was probably well founded, although it is not perhaps placed altogether upon the true grounds. The evidence, it is submitted, was inadmissible, not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz., for an exchange between the parties. The defendant was an attorney, and fraud was not alleged, nor indeed was mistake or surprise, for he had himself prepared the agreement, and he preferred making it a mutual contract for sale and purchase, instead of an exchange, and of course he could not be permitted to alter its character by parol evidence of the mode in which the negotiation was conducted, and of the views of the parties, in order to avoid the consequences which attached to the nature of the contract which the parties, with their eyes open, having regard to other objects, had thought it proper to adopt. It seems important to refer this case to the true ground upon which *it is to be supported, in order to prevent the rule from being misunderstood.

28. In a case where a written agreement for a lease was subsequently varied in part by parol, and upon a bill filed by the tenant for a specific performance of the original agreement, the landlord set up a subsequent parol waiver of the written agreement, and a new agreement entered into at his solicitor's, every term of which was to the disadvantage of the plaintiff, without any consideration for the variation ; the Master of the Rolls decreed a specific performance according to the prayer of the bill ; he considered the case made out by the landlord *not a waiver of the contract*, but a variation by parol which had not been acted upon, and which was made without consideration (n). The first parol variation, it may be observed, was admitted, and the plaintiff was willing to execute it.

29. Where after the written agreement for sale was signed, a variation was made and reduced into writing, but not signed, the purchaser having filed a bill for a specific performance, either with or without the variation, the Court put the seller to his election, and he having declined to elect, decreed a performance of the original agreement without the variation (o).

(n) Price v. Dyer, MS. 17 Ves. jun. 356 ; Robinson v. Page, 3 Russ. 114.

(o) Robinson v. Page, 3 Russ. 114.

30. The case before Lord Eldon (*p*) shows the rule of equity in a strong light. The landlord filed a bill for a specific performance of the written agreement, varied by the parol evidence; the tenant filed a cross-bill for a specific performance of the written agreement. The result was, that both bills were dismissed; the first, because parol evidence was not admissible as a foundation for a decree *enforcing* a specific performance; the second, on the ground that such evidence was admissible to rebut the equity of the plaintiff in the second bill.

31. A similar case appears to have been decided by Lord Macclesfield. The case has, I believe, never been cited, and it requires some attention to get at the facts. They appear, however, to be, that the plaintiff in the first bill sought a specific performance of an agreement by him to grant a lease to the defendant. The defendant set up a parol agreement by which he was to have liberty to grub bushes, and exhibited a cross-bill for a performance *in specie* of the written agreement, with the addition of a clause to grub bushes according to the parol agreement, and both the bills were dismissed, but without costs (*q*).

*32. Upon the admissibility of parol evidence, as a defense to a bill seeking a specific performance, Lord Redesdale has forcibly observed, that it should be recollected what are the words of the statute: "No person shall be charged upon any contract or sale of lands, unless the agreement, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." No person shall be charged with the execution of an agreement who has not, either by himself or his agent, signed a written agreement; but the statute does not say, that if a written agreement is signed, the same exception shall not hold to it that did before the statute. Now, before the statute, if a bill had been brought for specific performance, and it had appeared that the agreement had been prepared contrary to the intent of the defendant, he might have said, "That is not the agreement meant to have been signed." Such a case is left as it was by the statute: it does not say, that a written agreement shall bind, but that an unwritten agreement shall not bind (*r*). And nearly the same

(*p*) Lord Townshend *v.* Stangroom, 6 Ves. jun. 328.

(*q*) Hosier *v.* Read, 9 Mod. 86. I have

searched the Register's books for this case without success.

(*r*) 1 Scho. & Lef. Rep. 39.

observations upon the negative words of the statute, were made by Chief Baron Skinner, in the case of Rann and Hughes (s) (1).

33. But if parties enter into an agreement which is correctly reduced into writing, and at the same time add a term by parol, equity cannot look out of the agreement, although the person insisting upon the parol agreement is a defendant, and sets it up as a bar to the aid of the Court in favor of the plaintiff.

34. Thus, in *Omerod v. Hardman* (t) (2) the vendor filed a bill for a specific performance. It was not mentioned in the written agreement at what time the purchaser was to take possession of the estate; but the purchaser, the defendant, offered parol evidence to show that it was at the same time agreed, though not made part of the written agreement, that he should be let into possession at a stated time; and he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said, that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him,) he added, was to further the written agreement, and to secure what was through carelessness omitted to be provided for in the written agreement, viz. delivery *of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot by parol add any thing to what was the real agreement at the time after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol could not be made to form part of the written agreement (3).

(s) 7 Term Rep. 350, n.

(t) 5 Ves. jun. 722; and see pl. 28, *supra*; *qu.* the distinction.

(1) See 1 Phil. Ev. (4th Am. ed.) 568, 569; *Cummings v. Arnold*, 3 Metcalf, 490, 491, Per Wilde J.; 2 Story Eq. Jur. §770.

(2) See 2 Story Eq. Jur. §770, in note.

(3) Where by the terms of a written contract no time or place is fixed for the performance of the whole or of any particular part, the time and place will in general depend upon the construction which the law gives to the contract upon a consideration of the character of its stipulations; and under such circumstances, parol evidence of a specific time or place of performance agreed upon when the contract was made is not admissible, either to attach a term to the written contract, or to affect the legal construction of it. *Crocker v. Franklin Hemp and Flax Manuf. Co.* 3 Sumner, C. C. 530; *La Farge v. Rickert*, 5 Wendell, 187; *Thompson v. Ketcham*, 8 John. 190; *Atwood v. Cobb*, 16 Pick. 231; *Warren v. Wheeler*, 8 Metcalf, 97. See *Lawrence v. Dole*, 11 Vermont, 549; *Wyman v.*

35. Lord Hardwicke is reported (*u*) to have said, that a plaintiff seeking a specific performance might enter into parol evidence to show that the defendant was to pay the rent clear of taxes, no mention being made of taxes in the agreement ; because it was an agreement executory only, and as, in leases, there were always covenants relating to taxes, the Master would inquire what the agreement was as to taxes, and therefore the proof would not be a variation of the agreement. And this extra-judicial opinion appears to have been approved of by two other Judges (*x*), one of whom (*y*) laid it down, that parol evidence was admissible to prove collateral matters, concerning which nothing was said in the agreement, as who was to put the house in repair, or the like.

36. But notwithstanding these *dicta*, it has been expressly decided, that parol evidence of even collateral matters, such as the payment of taxes, &c. which are of the essence of the agreement, is inadmissible both at law and in equity. Thus, in *Rich v. Jackson* (*z*), it appeared that William Stiles and William Jackson entered into a treaty for the lease of a house belonging to Stiles, and in a conversation between them on the subject, Jackson offered 80*l.* a year rent, and that he would pay all the taxes, which Stiles agreed to accept. An agreement was drawn up by Jackson, in his own hand-writing, in which no notice was taken of taxes. Rich, who claimed under Stiles, refused to execute a lease unless the rent was made payable clear of taxes, and Jackson, the defendant, who claimed under William Jackson, refused to accept such a lease. Jackson having paid some money for land tax, brought an action in the Court of Common Pleas for the recovery of it, the plaintiff having refused to deduct it in the payment of the rent. The cause was tried at Guildhall, before Lord Rosslyn, then Chief Justice of the Common Pleas. The defendant was suffered to give parol evidence of the real agreement, and the Judge gave credit to the veracity of the witnesses, notwithstanding which he rejected the *evidence, and directed a verdict to be given for Jackson, with costs ; and, upon an application to the Court of Common Pleas, the Court approved of the verdict, and refused a rule to show cause why the same should not be set aside.

(*u*) 3 Atk. 389, 390 ; but see 4 Bro. C. 221.

C. 518 ; 6 Ves. jun. 335, n. ; 1 Scho. & (y) Mr. Justice Blackstone.

Lef. 38. (z) 4 Bro. C. C. 514 ; 6 Ves. jun.

(x) See 2 Blackst. 1250 ; 7 Ves. jun. 334, n.

Winslow, 2 Fairf. 398 ; Robinson v. Bachelder, 4 N. Hamp. 45, 46. But see Benson v. Peebles, 5 Missouri, 132.

37. In this branch of the case, therefore, the point was solemnly decided in a court of law, and the same determination was afterwards made upon the same case in a court of equity. Rich being defeated at law, filed his bill for a specific performance of the agreement, varied by the parol evidence; and the cause came on to be heard before Lord Rosslyn, then Lord Chancellor, who said, that the prior conversations, and the manner of drawing up the agreement by one party, and signing it by another, would have no influence. The real question was, whether in equity, any more than at law, the evidence ought to be admitted; whether there is any distinction in a court of equity, where a party comes to enforce a written agreement by obtaining a more formal instrument, and to add, in doing that, a term not expressed in the written agreement, and of such a nature as to bear against the written agreement. He had looked into all the cases, and could not find that the Court had ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circumstance that parol evidence could introduce (1). And he accordingly dismissed the bill, but without costs.

38. Indeed Lord Rosslyn appears to have made a similar decision in a case prior to that of *Rich v. Jackson*. The case to which I allude is *Jordan v. Sawkins* (a); where a bill was filed for a specific performance of a lease, and it was stated, that there was a memorandum annexed to the original agreement, that the tenant (I) was to pay the land tax (which, it must be presumed, was not signed, and was therefore only tantamount to a parol agreement). The cause was heard before the Lords Commissioners Eyre, Ashurst, and Wilson, who decreed a performance of the contract with the variation, that it was to be at a clear rent of 40*l.* *without deducting land-tax*. The cause was reheard before Lord Rosslyn, who said, that if the agreement had been carried into execution as it originally stood, the landlord must have paid the land tax. The Court could not specifically perform an agreement with a variation, and he therefore reversed the decree, and dismissed the bill (2).

(a) *Jordan v. Sawkins*, 3 Bro. C. C. 388; 1 Ves. jun. 402; and see *O'Connor v. Spaight*, 1 Scho. & Lef. 305; and see the cases *infra* as to the discharge of a parol agreement.

(I) In the Report, the name of the landlord, is by mistake inserted for that of the tenant.

(1) See ante, 156, note.

(2) See ante, 156, note.

*39. As a term agreed upon by parol cannot be added to a written agreement, by a parity of reason a written agreement cannot be *varied* by parol (1).

This was decided by Lord Thurlow in a branch of the last-mentioned case (6). It appeared that a lease was agreed, by writing, to be granted of a house for twenty-one years, to commence from the 21st of April 1791, and that it was afterwards agreed by parol, that the lease should commence on the 24th of June instead of the 21st of April. To a bill filed by the tenant for a specific performance of the written agreement, varied by the parol agreement, the statute of frauds was pleaded, and Lord Thurlow held, that the different period of commencing the lease made a material variation, as it gave the estate from the owner for so many months longer, and therefore he allowed the plea.

40. So, in the case of *Price v. Dyer* (c), which has already been mentioned, where a parol waiver of a written agreement was set up as a defense to a specific performance, Sir William Grant was of opinion, that there was not an abandonment of the agreement, but merely a variation, and that as the variation was without consideration, and had not been acted upon, it was not a good defense to the plaintiff's demand. After premising that the original written agreement was binding, and had not, in his opinion, been waived, he added, that here was a mere variation. The question then was as to the variation. His opinion was, that verbal variations were not a sufficient bar where the situation of the parties in all other respects remained unaltered. The defendant had lost nothing; would lose nothing. He had only lost what he had gratuitously gained. A specific performance of the original agreement was decreed, but without costs.

41. So in *Goss v. Lord Nugent* (d), a case at law, where the contract stipulated for a good title to several lots, but the purchaser, after the contract, and with notice of a defect in the title to one lot, waived the objection, and entered into possession, but afterwards resisted the contract; it was held, that the seller could not maintain an action for the purchase-money, on account of the statute of frauds.

(b) See 7 Ves. jun. 133.

(c) MS. Rolls, 17 Ves. jun. 356.

(d) 5 Barn. & Ell. 58; 2 Nev. & Mann. 28; *Stead v. Dawber*, 10 Adol. & Ell. 57;

Marshall v. Lynn, 6 Mees. & Wels. 109; cases on the 17th sect. to which the same law applies.

(1) See *Stevens v. Cooper*, 1 John. Ch. 425.

The Court observed, that by the general rules of the common law, if there be a contract which had been reduced into writing, verbal evidence was not allowed to be given of what passed between the parties, either before the written instrument was made, or during *the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract (1) ; but after the agreement had been reduced into writing, it was competent to the parties at any time before breach of it by a new contract, not in writing, either altogether to waive, dissolve, or annul the former agreement, or vary or qualify the terms of it, and thus to make a new contract ; which was to be proved partly by the written agreement, and partly by the subsequent verbal terms, engrafted upon what would be thus left of the written agreement (2). But the present contract was subject to the control of the statute of frauds. As this was only a waiver and abandonment of a part of the agreement, it might be said by the plaintiff that this did not in any degree vary what was to be done by either party ; that the same land was to be conveyed, there was to be the same extent of interest in the land, and it was to be conveyed at the same time, and the same price was to be paid, and that it was only an abandonment of a collateral point. But the Court thought that the object of the statute was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which was sought to be enforced must be proved by writing only. In the present case the written contract was not that which was sought to be enforced, it was a new contract which the parties had entered into, and that new contract was to be proved partly by the former written agreement, and partly by the new verbal agreement ; the present contract, therefore, was not a contract entirely in writing ; and as to the title being collateral to the land, the title appeared to the Court to be a most essential part of the contract ; for if there was not a good title the land might, in some instances, better not be conveyed at all. But the Court added, that their opinion was not formed upon the stipulation about the title being an essential part of the agreement, but upon the general effect and meaning of the statute of frauds, that the contract in question was not wholly one in writing.

42. The Court, in the above case, observed, that whether the

(1) Ante, 153, 154 and note ; *Parkhurst v. Van Cortlandt*, 1 John. Ch. 273.

(2) Ante, 154, note.

seller might not have relief in a court of equity they gave no opinion. Now, although the general rule of law upon the statute is the same at law as in equity, yet a purchaser is at liberty to accept a defective title if he think proper ; and if, as in the above case, he do so, and thereupon is let into possession, equity would bind him by his act, and compel him to complete the purchase.

43. In the above case (e) the Court referred to the cases at law on contracts within the statute of frauds, where verbal evidence *has been allowed to prove that the time for the performance of the contract had been enlarged by a verbal agreement (f), and where the decisions proceeded on the ground that the original contract continued, and that it was only a substitution of different days of performance(1). It was not necessary, the Court said, to say whether those cases were rightly decided. If they were so, still the case before them was a different case, for there, without doubt, the terms of the original contract were varied.

44. And in a later case at law, it was decided that the time could not be enlarged by parol (g) (2). The agreement was, that the assignment should be made and possession delivered on the 3d of May. Neither party was ready to carry the contract into effect on that day, and the purchaser on and subsequently to that day endeavored to remove an obstacle in the way of the title, and within what the Court considered a reasonable time, the objection would have been removed, had not the purchaser demanded a return of the deposit. So that the simple question arose, Can the day for the completion of the purchase of an interest in land in-

(e) 2 Nev. & Mann. 35.

& Ell. 57.

(f) Warren v. Staggs, 3 Term Rep. 591, cited; Thresh v. Rake, 1 Esp. N. P. C. 53; Cuff v. Penn, 1 Mau. & Selw. 21; overruled by Stead v. Dawber, 10 Adol.

(g) Stowell v. Robinson, 3 Bing. N. C. 928; see Horne v. Wingfield, 3 Scott's N. C. 340.

(1) "It is also well settled," says Mr. Greenleaf, 1 Greenl. Ev. §304, "that in a case of simple contract in writing, oral evidence is admissible to show that by a subsequent agreement the time of performance was enlarged, or the place of performance changed, the contract having been performed according to the enlarged time, or at the substituted place, or the performance having been prevented by the act of the other party." Watkins v. Hodges, 6 Harr. & John. 28; Clement v. Durgin, 5 Greenl. 9; Robinson v. Batchelder, 4 N. Hamp. 40. See Franchot v. Leach, 5 Cowen, 506; Youqua v. Nixon, 1 Peters C. C. 221; Bank v. Woodward, 5 N. Hamp. 99; Bailey v. Johnson, 9 Cowen, 115; Frost v. Everett, 5 Cowen, 497; Keating v. Price, 1 John. Cas. 22; Fleming v. Gilbert, 3 John. 530, 531; Medomak Bank v. Curtis, 24 Maine, 36; Blood v. Goodrich, 9 Wendell, 68; Low v. Treadwell, 3 Fairf. 444; Central Bank v. Willard, 17 Pick. 150; Walker v. Russell, 17 Pick. 280; Avery v. Kellogg, 11 Conn. 574, 575.

(2) See next preceding note and cases cited; Farnham v. Ross, 2 Hall (N. Y.) 171, Per Oakley J.

sented in a written contract be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties ? And it was held that it could not. The Court could not get over the difficulty that to allow the substitution of a new stipulation as to the time of completing the contract, by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time, contained in the written agreement signed by the parties, was virtually and substantially to allow an action to be brought on an agreement relating to the sale of land, partly in writing signed by the parties, and partly not in writing, but by parol only, and amounted to a contravention of the statute of frauds. They thought that the reasoning upon which the Court of King's Bench proceeded in *Goss v. Lord Nugent* went directly to the point, that the evidence then under consideration was inadmissible (1).

45. These decisions will drive many cases into equity, where, as we shall hereafter see, time may be enlarged or waived by the acts of the parties, or even the nature of the title may induce the Court to consider it not of the essence of the contract (*h*). Where the time is varied by the agreement of the parties, courts of equity, who, according to their general rule, consider themselves as *having full power to open the time apointed, would of course adopt that which the parties themselves had agreed upon, although only by parol. And they might fairly consider it, as heretofore it was considered even at law, as not varying the substance of the contract itself, which is still to be executed, although at the enlarged time.

46. Where the parol variation has been in part performed, equity, acting upon its general principles, will decree a specific performance of the agreement as varied by parol.

47. Thus in a case reported by Viner (*i*) : *A* leased a house to *B* for eleven years, and was to allow 20*l.* to be laid out in repairs ; the agreement was reduced into writing, and signed and sealed by both parties. *B* repaired the house, and finding it to take a much greater sum than the 20*l.*, told *A* of it, and that he would nevertheless go on and lay out more money if he would enlarge the term to twenty-one years, or add fourteen, or as many as *B* should think

(*h*) See Chap. 5.

(*i*) Anon. 5 Vin. 522, pl. 38 ; 4 Geo. 1.

(1) *Hasbrouck v. Tappen*, 15 John. 200 ; *Dubois v. Del. & Hudson Canal Co.* 4 Wendell, 285 ; *Jewell v. Schroepel*, 4 Cowen, 564.

fit. *A* replied, that they would not fall out about that, and afterwards declared that he would enlarge the term, without mentioning the term in certain. The question was, whether this new agreement, made by parol, which varied from the written agreement should be carried into execution, notwithstanding the statute of frauds. The Master of the Rolls said, that before the statute, a written agreement could not be controlled by a parol agreement, contrary to it, or altering it; *but this was a new agreement*, and the laying out the money was a part-performance on one part, and ought to be carried into execution: and built his decree on these cases: first, where a parol agreement was for a building lease, and before it was reduced into writing, the lessee began to build, and after differing on the terms of the lease, the lessee brought a bill, and the lessor insisted on the statute of frauds; the Lord Keeper dismissed the bill, but the plaintiff was relieved in *Dom. Proc.*: and the second was a case in Lord Jefferies's time.

48. So, in the case of *Legal v. Liller (k)*: The agreement was for taking a house at 3*l.* per annum, and part of the agreement was, that the owner should put the house in repair. It was afterwards discovered not to be worth while barely to repair the house, but better to pull it down; and, therefore, without any alteration in the written agreement, the house was pulled down by consent of the tenant, apprised of the great expense it would be to the landlord; and an agreement was made by parol only, on the part of the tenant, to add 8*l.* per annum to the 3*l.* The *tenant* brought a bill for specific performance, on the foot of the written agreement, *by which he was to, pay only the 3*l.* rent. The defendant, by his answer, set up the parol agreement. Sir John Strange said, such evidence is frequently suffered to be read, especially to *rebut such an equity* as now insisted on by the bill: as where the agreement is in part carried into execution, parol evidence is allowed to prove that: *or where it is a hard agreement; and the Court may, therefore, decree against the written agreement, as in 1 Vern. 240, (Gorman v. Salisbury)*: and the single question being here, whether the Court should decree a specific performance of the agreement the plaintiff insists upon, and being satisfied, from the parol evidence, that it should not, the Court must dismiss the bill. And in the subsequent case of *Pitcairne v. Ogbourne (l)*, Sir John Strange referred to this decision, and approved of it.

(k) 2 Ves. 299.

(l) 2 Ves. 375.

49. And in *Price v. Dyer* (*m*), Sir Wm. Grant said, that variations acted upon as in *Legal v. Miller*, would be a bar ; that is a fraud.

50. The result of the authorities as to a parol *variation*, appears to be,

1st, That evidence of it is totally inadmissible at law.

2dly, That in equity the most unequivocal proof of it will be expected.

3dly, That if it be proved to the satisfaction of the Court, yet it cannot be used as a defense to a bill demanding a specific performance of the original contract alone, or as a ground for granting a specific performance of the original contract, with the variation introduced by parol, unless there has been such a part-performance of the new parol agreement, as would enable the Court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement (*n*), and effect will be given to it either in favor of a plaintiff or a defendant.

51. But we must bear in mind that some variations, not admitted at law, for example, the title and time, equity has always, exercising its peculiar jurisdiction, deemed to be subjects which the parties might waive by their acts.

52. Even where part of the subject-matter of the agreement might have been valid by sale and delivery, and an agreement in writing was not requisite, yet if the agreement be entire, it must so continue, and it cannot be separated or altered otherwise than by writing (*o*) (1).

(*m*) *Supra*, 166.

(*o*) *Harvey v. Graham*, 5 Adol. & Ell.

(*n*) See *Van v. Corpe*, 3 Myl. & Kee. 61.
277.

(1) 2 Story Eq. Jur. §770, in note.

*SECTION IX.

OF THE ADMISSIBILITY OF PAROL EVIDENCE TO ANNUL WRITTEN INSTRUMENTS.

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| 1. Principle of the rule : parol waiver. | 7. Robinson v. Page. |
| 2. Gorman v. Salisbury. | 8. Goss v. Lord Nugent. |
| 3. Buckhouse v. Crossby. | 9. Result. |
| 5. Davis v. Symonds. | 10. Waiver of parol agreement cannot be proved. |
| 6. Price v. Dyer. | |

1. The rule of law is, *nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est* : and therefore a covenant under seal not broken cannot be discharged by parol agreement (a) (1). And in general, as we have seen, an agreement

(a) Kaye v. Waghorn, 1 Taunt. 428.

(1) Chitty Contr. (8th Am. ed.) 107 ; Bond v. Jackson, Cooke, 500 ; Sinard v. Patterson, 3 Blackf. 353 ; 1 Phil. Ev. (4th Am. ed.) 563, 564, & Cowen & Hill's notes, Pt. 2, pp. 1479 to 1481 ; Suydam v. Jones, 10 Wendell, 180, 184 ; 1 Greenl. Ev. §302. In Dearborn v. Cross, 7 Cowen, 48, it was decided that a bond might be discharged by the parol agreement and acts of the parties. In Munroe v. Perkins, 9 Pick. 302, the court said ;—" It is objected, that as the evidence was parol, it is insufficient in law to defeat or avoid the special contract ; and many authorities have been cited, to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature ; or generally, that a contract under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, *unumquodque dissolvitur eo ligamine quo ligatur*. But like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c." See Lattimore v. Harsen, 14 John. 330 ; Fleming v. Gilbert, 3 John. 358 ; Keating v. Price, 1 John. Cas. 22 ; Edwin v. Saunders, 1 Cowen, 250 ; Bullard v. Walker, 3 John. Cas. 64 ; Le Fevre v. Le Fevre, 4 Serg. & Rawle, 241 ; Grafton Bank v. Woodward, 5 N. Hamp. 99 ; Bailey v. Johnson, 9 Cowen, 115 ; Mill Dam Foundry v. Hovey, 21 Pick. 417 ; Blood v. Hardy, 15 Maine, 61, 64 ; Lawrence v. Dole, 11 Vermont, 549 ; Neil v. Tillman, 1 Bailey, 538, n. (a) ; Merrill v. I. & O. R. R. Co. 16 Wendell, 586 ; Watchman v. Crook, 5 Gill & John. 239 ; Ford v. Campfield, 6 Halst. 327.

In Delacroix v. Bulkley, 13 Wendell, 75, Mr. Chief Justice Savage, after having reviewed the New York authorities upon this point said ;—" The extent to which these cases have gone is this ; that after a breach of a sealed contract, the parties to it may discharge any liability upon it by entering into a new agreement in relation to the same subject matter, which new agreement is a valid contract, founded upon sufficient consideration. In Fleming v. Gilbert, it is assumed that the plaintiff prevented the defendant from performing his contract, and therefore should not take advantage of his failure. To bring this case within the principle

in writing cannot be controlled by averment of the parties, as it would be dangerous to admit such nude averments against matter in writing (*b*). This was an imperative rule, previously to the statute of frauds. That Act provides that no action shall be brought upon any agreement made upon any contract or sale of lands, or any interest in or concerning the same, unless the agreement is in writing and signed by the party to be charged. A parol waiver, like a written agreement not under seal, is a simple contract; and a parol waiver not being a contract for sale, may be said not to fall within the provision of the statute. But Lord Hardwicke observed, that an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract (*c*). The statute excludes parol agreements as to lands, and makes written agreements *prima facie* valid. No action is to be brought upon any agreement made upon any contract or sale of lands, &c., unless in writing. Now a waiver *is* an agreement made upon a contract or sale of lands, viz., an agreement to relinquish the benefit of such an agreement; and although the statute only prohibits the bringing any action unless the agreement is in writing, yet that may well be construed to prevent the setting up a parol agreement as a defense to an action upon a valid written agreement. The agreement **must* be in writing, or no action can be maintained upon it. Does not this, by a necessary implication, exclude a parol agreement which is to waive a written one? Is not the like mischief to be guarded against in each case (1)?

(*b*) Countess of Rutland's case, 5 Co. 254.

25 b; Blemerhasset v. Pierson, 3 Lev. (c) 2 Eq. Ca. Abr. 53.

of Lattimore v. Harsen, there should have been not only an avowed refusal to perform, but a subsequent executed substituted agreement; and so, also, as to the case of Dearborn v. Cross." "It will be seen, then, that there has been no innovation upon established principles, and that the law remains as it has always existed, that a sealed executory contract cannot be released or rescinded by a parol executory contract; but that, after breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract." See Snyder v. Jones, 10 Wendell, 180, 181; Barnard v. Darling, 11 ib. 27, 30. Mr. Greenleaf says, "If the agreement be by deed, it cannot, in general, be dissolved by any executory agreement of an inferior nature; but any obligation by writing not under seal may be totally dissolved, before breach, by an oral agreement. And there seems little room to doubt, that this rule will apply even to those cases where a writing is by the statute of frauds made necessary to the validity of the agreement." 1 Greenl. Ev. §302.

(1) See Swan v. Drury, 22 Pick. 185. See the statement of the rule by Mr. Greenleaf in the last preceding note; 1 Phil. Ev. (4th Am. ed.) 408; Cummings v. Arnold, 3 Metcalf, 486; Bullard v. Walker, 3 John. Cas. 60; Marshall v. Baker, 19 Maine, 402; Chitty Contr. (8th Am. ed.) 107.

2. In a case of which there is a short note in *Vernon* (*d*), the precise point occurred, and the Lord Keeper held, that the agreement might be discharged by parol, and therefore dismissed the bill, which was brought to have the agreement executed *in specie*.

3. Then came the case of *Buckhouse and Crossby*, before Lord Hardwicke (*e*), where, to a bill filed by a purchaser for a specific performance, the vendor insisted the contract had been *discharged* by parol, and the case of *Gorman v. Salisbury* was cited by his counsel as an authority in his favor. The Lord Chancellor, under the circumstances, decreed for the plaintiff, with costs; and declared, that though he would not say that a contract in writing would not be waived by parol, yet he should expect, in such a case, very clear proof; and the proof, in the present case, he thought very insufficient to discharge a contract in writing; and observed, that the statute of frauds and perjuries requires that "all contracts and agreements concerning land should be in writing." Now, an agreement to waive a purchase contract is as much an agreement concerning lands as the original contract. However, he said, there was no occasion then to determine this point. Lord Hardwicke's observation, that the statute requires all contracts to be in writing, is correct; for, if they are not, they cannot be enforced; but the clause is, as we have seen, merely negative, that no agreement concerning land shall be enforced unless it is in writing.

4. In another case, Lord Hardwicke is reported to have said, that it was certain that an interest in land *could not be parted with, or waived by naked parol, without writing*; yet articles might, by parol, be so far waived, that if the party came into equity for a specific execution, such parol waiver would rebut the equity which the party before had, and prevent the Court from executing them specifically (*f*) (1).

(*d*) *Gorman v. Salisbury*, 1 Vern. 240.

I could not discover any trace of this cause in the Register's book.

(*e*) 2 Eq. Ca. Abr. 32, pl. 44; 10 Geo. 2. See *Garrett v. Lord Besborough*, 2

Ir. Eq. Rep. 180.

(*f*) *Bell v. Howard*, 9 Mod. 302; and see *Earl of Anglesea v. Amnesley*, 4 Bro. P. C. 421.

(1) In *Stevens v. Cooper*, 1 John. Ch. 429, 430, Mr. Chancellor Kent, said;—"There is another rule which has some connection with this branch of the law of evidence, and which will in certain cases, and on certain terms, admit an agreement in writing, concerning lands, to be *discharged* by parol. But the evidence in such cases is good only as a defense to a bill for a specific performance, and is totally inadmissible, at law or equity, as a ground to compel a performance in *specie*." *Botsford v. Burr*, 2 John. Ch. 416.

5. In *Davis v. Symonds* (*g*), where it was insisted that the agreement was waived, and that such waiver might be by parol, the Chief Baron observed, that it certainly might be so; the waiver *was, in its own nature, subsequent to and necessarily collateral to the agreement, and therefore could never bear any relation to the rule of evidence forbidding parol evidence to alter the agreement. There might, indeed, he added, have been another rule that a written agreement should not be waived by parol, but, in fact, courts of equity did not consider themselves as bound by any such rule; and it was then clear that a written agreement might be waived so (1).

6. And it has been the prevailing opinion that a written contract may, in equity, be discharged by a parol agreement (*h*). And in the case of *Price v. Dyer* (*i*), before referred to, Sir William Grant said, that he inclined to think the effect of a clear abandonment by parol, would be to discharge the written agreement. But in the cases which had occurred, the parol agreement put an end to the transaction, and restored the parties to their original situation (2).

(*g*) 1 Cox, 402, 1787.

Wooddes, 428; s. 4. Rob. stat. of frauds,

(*h*) 1 Ves. jun. 404; 4 Bro. C. C. 519; 89; Inge v. Lippingwell, 2 Dick. 469.

6 Ves. jun. 337, n.; 9 Ves. jun. 250; 3 (*i*) MS. Rolls; S. C. 17 Ves. jun. 356.

But where an absolute deed of land is given, accompanied by a simultaneous instrument, which is not recorded, operating by way of defeasance, and afterwards the parties, by mutual stipulations, agree that the defeasance shall be surrendered and cancelled, with intent to vest the estate unconditionally in the grantee, by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee, provided the transaction is conducted with fairness, both as between the parties and as against the creditors of the mortgagor, and that the rights of third persons had not intervened before the completion of the transfer by the cancellation. *Trull v. Skinner*, 17 Pick. 213; *Harrison v. Phillips Academy*, 12 Mass. 456; *Rice v. Rice*, 4 Pick. 349. In the above case of *Trull v. Skinner*, 17 Pick. 215, Mr. Chief Justice Shaw said:—"Such cancellation does not operate by way of transfer, nor strictly speaking by way of release working upon the estate, but rather as an estoppel arising from the voluntary surrender of the legal evidence, by which alone the claim could be supported; like the cancellation of an unregistered deed, and a conveyance by the first grantor to a third person without notice. The cancellation reconveys no interest to the grantor, and yet taken together, such cancellation and conveyance to a third person make a good title to the latter by operation of law." See also *Farrar v. Farrar*, 4 N. Hamp. 191; *Tomson v. Ward*, 1 N. Hamp. 9; *Woodbury J. in Chesley v. Frost*, 1 N. Hamp. 147; *Bullen v. Runnels*, 2 N. Hamp. 260; *Commonwealth v. Dudley*, 10 Mass. 403; *Barrett v. Thorndike*, 1 Greenl. 73; *Nason v. Grant*, 21 Maine, 160; *Holbrook v. Tirrell*, 9 Pick. 105; 2 Cruise Dig. by Mr. Greenleaf, vol. 4, Tit. 32, ch. 1, §15 note.

But it is clear from the above cases and others, that the mere cancellation of the deed, by the grantee, without more, does not divest his title or revest it in the grantor. *Hatch v. Hatch*, 9 Mass. 311; *Dando v. Tremper*, 2 John. 87; *Lewis v. Payn*, 8 Cowen, 75; *Botsford v. Morehouse*, 4 Conn. 550; *Gilbert v. Bulkley*, 5 ib. 262. An agreement to cancel a deed, without an actual cancelling, has no effect as an estoppel, or a re-conveyance. *Farrar v. Farrar*, 4 N. Hamp. 191; *Morse v. Child*, 6 N. Hamp. 521.

(1) 2 Story Eq. Jur. §770; *Wood v. Perry*, 1 Barbour, 114.

(2) See ante, 172, in note.

7. And in a case before Lord Lyndhurst, when Master of the Rolls (*k*), he observed, that it was said, and authorities were cited to show that parol waiver and abandonment might be set up as a defense to a bill for specific performance. Unquestionably, he added, waiver even by parol would be a sufficient answer to the plaintiff's claim, but the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.

8. In a late case at law (*l*) the Court observed, that the statute does not say in distinct terms that all contracts concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing, and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should rather seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, so as to prevent either party from recovering on the contract which was in writing (1). It was not, however, necessary, the Court added, to give an opinion upon that point.

9. The result is, that an abandonment of the whole agreement clearly made out—for the Court will look at the evidence with great jealousy—is a good *defense* in equity, but that it is doubtful *whether such a defense is available at law: perhaps the better opinion is that it is inadmissible at law (2).

10. In considering the point under discussion, the reader will be careful not to confound the foregoing cases with the case of *Walker v. Constable* (*m*). There the *original* agreement was a *parol* agreement; and the question was, whether, being abandoned, parol evidence could be given of it. Lord C. J. Eyre held, that the existence and the terms of the agreement must be proved before it could be proved to be abandoned, and upon that it was sufficient to say, that *being in writing* (1) the instrument itself must be produced, and parol evidence of it was inadmissible.

(*k*) *Robinson v. Page*, 3 Russ. 112.

upon the 17th section.

(*l*) *Goss v. Lord Nugent*, 5 Barr. & Adol. 58; 2 Nov. & Mann. 34; see *Stead v. Dawber*, 10 Adol. & Ell. 57, a case

12 Esp. 659; 1 Bos. & Pull. 306. See *Adams v. Fairbairn*, 2 Stark. 277.

(1) That is, in contemplation of law, for it is not deemed an agreement unless reduced into writing.

(1) Ante, 157, 163, and notes.

(2) See ante, 171. in note.

*SECTION X.

OF PAROL EVIDENCE TO EXPLAIN AMBIGUITIES.

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| 1. <i>Sorts of ambiguities.</i> | 12. <i>Contra in equity upon mistake.</i> |
| 2. <i>Latent ambiguity cleared up by parol evidence.</i> | 13. <i>Situation of parties, &c. looked at where there is ambiguity.</i> |
| 4. <i>Patent ambiguity not.</i> | 15. <i>Ancient statute: contemporaneous usage.</i> |
| 7. <i>Explanation of words of trade in Act of Parliament.</i> | 16. <i>Whether price can be looked at where there is an ambiguity.</i> |
| 8. <i>General words not restrained by parol.</i> | |

1. **THIS** branch of our subject, although the most trite, is not perhaps, therefore, less difficult. Bacon says (*a*), there are two sorts of ambiguities of words, the one is *ambiguitas patens*, and the other *latens*. *Patens*, he adds, is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seems certain, and without ambiguity, for anything that appears upon the instrument, but there is some collateral matter out of the deed that breeds the ambiguity (1).

*2. A latent ambiguity may be assisted by parol evidence, because the ambiguity being raised by parol, may fairly be dissolved

(*a*) Max. p. 82; Reg. 23.

(1) See *Peisch v. Dickson*, 1 Mason C. C. 9. In this case Mr. Justice Story said;—"There seems indeed to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case I should think parol evidence might be admitted, to show the circumstances, under which the contract was made, and the subject matter to which the parties referred. For instance, the word "freight" has several meanings in common parlance; and if, by a written contract, a party were to assign his freight in a particular ship, it seems to me, that parol evidence might be admitted of the circumstances, under which the contract was made, to ascertain, whether it referred to goods on board of the ship, or an interest in the earnings of the ship; or, in other words, to show in which sense the parties intended to use the term." 1 Mason, 11, 12. See also *Dupree v. McDonald*, 4 Desaus. Eq. 211; *Per Bayley J. in Smith v. Jersey*, 2 Brod. & Bingh. 549, 555; *Master of the Rolls, in Colpoys v. Colpoys*, Jacob, 451; *Spencer Ch. J. in Ely v. Adams*, 19 John. 317; 2 Part Cowen & Hill's notes to Phil. Ev. note 938, pp. 1358 et seq.; 1 Greenl. Ev. §288, §297 et seq.; *Gresley Eq. Ev.* 278 et seq.; *Rail Road Co. v. Ormsby*, 7 Dana, 277.

by the same means, according to the general rule of law (1). Therefore, if, previously to the statute, a man having two manors, both called Dale, had conveyed the manor of Dale to another, evidence might have been given to prove which manor was intended to pass (b), and such evidence is still admissible; this has been repeatedly decided (c). So, on the same principle, parol evidence is always received to show what is parcel or not of the thing conveyed (d). And if an agreement refer to a plan as an existing document upon which the contract is founded, parol evidence is admissible for the purpose of identifying the plan (e).

3. In some cases a latent ambiguity may be fatal. Parol evidence may be adduced to prove the ambiguity, where none sufficiently satisfactory can be offered to explain it (f). And to render parol evidence admissible in these cases, a clear latent ambiguity must be first shown (2). Evidence which merely raises a conjecture is insufficient (g).

4. But although a latent ambiguity may be aided by parol evidence, yet a patent ambiguity cannot be aided by extrinsic evidence, because that would in effect be to pass without deed, what by the law can be passed by deed only. Of this, Bacon observes, infinite cases might be put; for it holdeth generally, that all ambiguity of words by the matter within the deed, and not out of the deed, shall be helped by construction, or in some

(b) 2 Ro. Abr. 676, pl. 11; and see *Lord Cheney's case*, 5 Rep. 68; *Altham's case*, 8 Rep. 155 a; and *Harding v. Suffolk*, 1 Cha. Rep. 74.

(c) *Jones v. Newman*, 1 Blackst. 63; 3 Wils. 276; 2 Atk. 239, 240, 373; 1 Bro. C. C. 341; [*Pritchard v. Hicks*, 1 Paige, 270.]

(d) *Quaintrell v. Wright*, Bunb. 274; *Longchamps v. Fawcett*, Peake's Ca. 71; *Doe v. Burt*, 1 Term Rep. 701; *Anon.* 1 Str. 95. [See *Hatch v. Hatch*, 2 Hayw. 32; *White v. Egan*, 1 Bay. 247; *Middleton v. Perry*, 2 Bay. 539; *Lofter v. Heath*, 2 Hayw. 347; *Baker v. Beekright*, 1 Hen. & Mumf. 177]. But where

there is property to satisfy the words of the will, it cannot be shown by parol evidence that the testator meant to pass some not within the description. See *Doe v. Oxendon*, 3 Taunt. 147; and see and consider *Boys v. Williams*, 2 Russ. & Myl. 689.

(e) *Hodges v. Horsfall*, 1 Russ. & Myl. 116.

(f) *Thomas v. Thomas*, 6 Term Rep. 671; see *Bradshaw v. Bradshaw*, 2 You. & Coll. 72; *Alexander v. Crosbie*, Rep. t. Sugd. 145.

(g) See *Lord Walpole v. Earl of Cholmondeley*, 7 Term Rep. 138.

(1) See *Wooster v. Butler*, 13, Conn. 309; *Storer v. Freeman*, 6 Mass. 440, 441; *Webster v. Atkinson*, 4 N. Hamp. 23; *Mann v. Mann*, 1 John. Ch. 231, 234; *Vernon v. Henry*, 3 Watts, 385; 1 Phil. Ev. (4th Am. ed.) 531; *Gresley Eq. Ev.* 284 et seq; *Piesch v. Dickson*, 1 Mason, 11; *Patrick v. Grant*, 14 Maine, 233; *Doe v. Jackson*, 1 Smodes & Marsh, 494; *Paysant v. Ware*, 1 Alabama, 160; *Brainerd v. Cowdry*, 16 Conn. 1; *Mead v. Steger*, 5 Porter, 498; *Cole v. Wendell*, 8 John. 92; *Stone v. Clark*, 1 Metcalf, 381, 382, *Per Wilde J.*; *Brown v. Haven*, 3 Fairf. 164; *Evelth v. Wilson*, 15 Maine, 109.

(2) *Paysant v. Ware*, 1 Alabama, 160.

cases by election, but never by averment, but rather shall make the deed void for uncertainty (1).

5. In *Mansell v. Price*, personal estate was settled in trust for Price the defendant, and Catherine his wife, for their lives, and the life of the survivor of them, and then for their issue, with a power to the wife to dispose of 1,500*l.*, part of the moneys, to any persons she pleased. She exercised this power, by giving the money to Sir Edward Mansell, in trust to pay 1,000*l.* to *A*, when *she should attain twenty-one, or marry; but if she died before twenty-one, or marriage, then it should be to such uses as *B* should appoint. And the other 500*l.* she directed to be paid to *C*, in exactly the same terms as before. The bill was filed by the guardian of *A* and *C*, infants, to have the money paid, and to be put out for them to have the interest thereof immediately. For the defendant Price, it was insisted that he was entitled to the interest of 1,500*l.*, until it should become payable. The first question was, whether parol evidence could be admitted to explain the intention of Catherine Price what should become of the interest till the times of payment; for if that could be admitted, there was sufficient to prove the husband should not have it. And the Master of the Rolls was of opinion that such evidence could not be read (*h*).

6. So in *Kelly v. Powlett (i)*, the question was, whether plate passed under a bequest of household furniture. The drawer of the

(*h*) MS. T. Term, 8 & 9 Geo. 2; and see *Hart v. Durand*, 3 Anstr. 684; *Chamberlaine v. Chamberlaine*, 2 Freem. 52; *Ulrich v. Ditchfield*, MS. 2 Atk. 372, where the evidence was not received.

reported, which I conceive has overruled *Pendleton v. Grant*, 1 Eq. Ca. Abr. 230, pl. 2; 2 Vern. 517; and see 1 Bro. C. C. 350, 351; *Seymour v. Rapier*, Bunb. 28; *Doe v. Bland*, 11 East, 441.

(*i*) 1 Bro. C. C. 476, cited; Ambl. 605,

(1) *Stackpole v. Arnold*, 11 Mass. 29, 30, Per Parker J.; *Webster v. Atkinson*, 4 N. Hamp. 22, 23; *Peisch v. Dickson*, 1 Mason, 11; *Fish v. Hubbard*, 21 Wendell, 651; *Lett v. Homer*, 5 Blackf. 296. "The patent ambiguity," says Mr. Greenleaf, "of which Lord Bacon speaks, must be understood to be that which remains uncertain to the court, after all the evidence of surrounding circumstances and collateral facts, which is admissible under the rules already stated, is exhausted. His illustrations of this part of the rule are not cases of misdescription, either of the person or of the thing to which the instrument relates; but are cases, in which the persons or things being sufficiently described, the intention of the party in relation to them is ambiguously expressed. Where this is the case, no parol evidence of expressed intention can be admitted." 1 Greenl. Ev. §300.

For a citation of cases, which seem to have been regarded as falling within Lord Bacon's definition of a patent ambiguity, see, 2 Part Cowen & Hill's Notes to Phil. Ev. note, 938 pp. 1360, 1361; *Storer v. Freeman*, 6 Mass. 435; *King v. King*, 7 Mass. 496; *Mann v. Mann*, 1 John. Ch. 231; *Jackson v. Sill*, 11 John. 101; *Rothmaler v. Myers*, 4 Desaus. 215; *Dupree v. McDonald*, 4 Desaus. 212; *Hamilton v. Cawood*, 2 Harr. & M'Hen. 437.

will said, it was *not* intended; but his evidence was refused, and the plate was held to pass (1).

7. Again, in a case in the Exchequer (*k*), it appeared that, by an act of Parliament, cast plate-glass was directed to be *squared* into plates of certain dimensions. The question was, whether certain plates were in the shape directed by the act. The Attorney-general at the trial produced books explaining the process and terms of the art in the manufacture, and the defendants offered evidence to prove the technical meaning in the trade of the word *squaring* glass; the evidence was however, refused, and a verdict found against the defendants: and upon a motion for a new trial, Lord Chief Baron Eyre said: In explaining an act of parliament, it is impossible to contend that evidence should be admitted, for that would be to make it a question of fact, in place of a question of law. The judge is to direct the jury as to the point of law, and in doing so must form his judgment of the meaning of the Legislature, in the same manner as if it had come before him on demurrer, when no evidence would be admitted. Yet on a demurrer a judge may well inform himself from dictionaries or books, on the particular subject concerning the meaning of any word. If he does so *at nisi prius*, and shows them to the jury, *they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite any authorities for the point of law he lays down.

8. So parol evidence is inadmissible to restrain the legal operation of general words in an instrument (2). Therefore it cannot be admitted to prove, that a particular estate was not intended to pass under general words sufficient to comprise it.

9. Thus, in *Davis v. Thomas* (*l*), a husband and wife being seised of settled estates in the county of Pembroke, bought an estate in the same county, called Rigman Hill, which was conveyed to them, and the survivor in fee. The husband having prevailed on the wife to join with him in suffering a recovery of the settled estates, in order to enable him to mortgage them, gave the attorney employed to suffer the recovery a particular description of the settled estates, which did not comprise Rigman Hill; and it *clearly* ap-

(*k*) Attorney-General *v.* The Cast Plate Glass Company, 1 Austr. 39; see *Thomas v. Davis*, 1 Dick, 301, *et infra*. Clayton *v.* Gregson, 5 Adol. & Ell. 302.

(1) 1 Jarman Wills, ch. XIV, (2d Am. ed.) 351 and note (1) and cases cited.

(2) *Pierson v. Hooker*, 3 John. 68; *Hoes v. Van Hoesen*, 1 Barbour Ch. R. 379; *Rice v. Woods*, 21 Pick. 20; *Harris v. Dinkins*, 4 Desaus. 60.

peared, from several circumstances, that he had not any intention to comprise that estate, the title-deeds of which were in his wife's custody. The attorney, fearful of not comprising the whole estate, and not knowing that Rigman Hill had been purchased, added general words sufficient to comprise that estate. The recovery was suffered to the use of the husband in fee, who afterwards mortgaged the estate by the same description. The husband by his will gave all his estates to his wife for life. She survived him, and after her death the heir at law of the husband brought an ejectment against the persons claiming Rigman Hill, under the wife, which came on to be tried at the April Great Sessions for Pembroke-shire, in 1756. Parol evidence was offered by the defendant, to show that it was not intended to comprise Rigman Hill in the recovery and mortgage: but it was refused, and the plaintiff had a verdict.

10. So in *Shelling v. Farmer* (*m*), where to a release in pursuance of an award, the plaintiff would have called the arbitrators to prove that they refused to take into consideration a particular fact, although the award and release contained *general words* sufficient to take in all: Eyre, C. J., would not suffer any evidence to be given to contradict the deed (1).

11. And in the recent case of *Butcher v. Butcher* (*n*), *general words* in a release were held not to extend to a certain bond of indemnity: and Chief Justice Mansfield, at Guildhall, refused to *admit parol evidence to show the intention of the releasor to release the bond. And upon a motion for a new trial, the Court of Common Pleas intimated a strong opinion, that no evidence could be admissible to explain the release, since the doubt, if any, was *ambiguitas patens*; and in consequence of this intimation the counsel for the plaintiff declined arguing the case.

12. But, as we shall presently see, the effect of general words may be restrained in a court of equity, on the ground of mistake, where it is satisfactorily proved.

13. It still remains to observe, that courts both of law and equity constantly advert to the situation of the parties, &c. in order to enable them to construe ambiguous or ill-penned instruments (2), al-

(*m*) 1 Str. 646. See *Strode v. Lady* and *Goodinge v. Goodinge*, 1 Ves. 231. *Falkland*, 2 Vern. 621; 3 Cha. Rep. 90; (*n*) 1 New Rep. 113.

(1) *DeLong v. Stanton*, 9 John. 38; *Monroe v. Alaier*, 2 Caines, 320; *Sessions v. Barfield*, 2 Bay. 94.

(2) 1 Phil. Ev. (4th Am. ed.) 543; *New York v. Butler*, 1 Barbour, 325; 1 Jarman, Wills (2d Am. ed.) 342 in note, ch. XIV; 1 Phil. Ev. (4th Am. ed.) 543.

though parol evidence of the intention of the parties could not be received (1), and this has been sanctioned by a leading case in the House of Lords (o).

14. In one case (p), where it was doubtful whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively under the covenant, Lord Mansfield and the other Judges of the King's Bench held, that the parties themselves had put a construction upon the covenant, and were therefore bound by it. Lord Alvanley, who was in the cause, said, when Master of the Rolls, that he was never more amazed than at this decision, and that Mr. Justice Wilson, who argued with him, was astonished at it (q); and he more than once expressed his marked disapprobation of this doctrine (r). Lord Eldon (s), and Sir Wm. Grant (t), have both also dissented from it; and C. J.

(o) Sir John Eden v. the Earl of Bute, 7 Bro. P. C. 745. See Countess of Shelburne v. the Earl of Inchiquin, 1 Bro. C. C. 338.

(p) Cook v. Booth, Cowp. 819; and see Blackst. 1249; 1 New Rep. 42. See Peak on Evid. ch. 2.

(q) Baynham v. Guy's Hospital, 3

Ves. 295; and see 2 Ves. jun. 448.

(r) See Eaton v. Lyon, 3 Ves. jun. 690.

(s) See Iggulden v. May, 9 Ves. jun. 325.

(t) See Moore v. Foley, 6 Ves. jun. 232.

Mr. Greenleaf, says;—"The rule," in reference to the admission of parol evidence to explain written instruments, "is directed only against the admission of any other evidence of the *language*, employed by the parties in making the contract, than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, *no other words* are to be added to it, nor substituted in its stead. The duty of the court in such cases is to ascertain, not what the parties may have secretly intended, as contra-distinguished from what their words express; but what is the meaning of the words they have used." 1 Greenl. Ev. §277. Again he says;—"The object is to discover the intention. And to do this, the court may *put themselves in the place of the party*, and then see how the terms of the instrument affect the property, or subject matter. With this view, evidence must be admissible of all the circumstances surrounding the author of the instrument," ib. §287. See Smith v. Bell, 6 Peters S. C. 75; Wooster v. Butler, 13 Conn. 318, Per Church J. Again Mr. Greenleaf says;—"It is only in this mode that parol evidence is admissible, (as is sometimes, but not very accurately, said,) to *explain written instruments*; namely, by showing the situation of the party in all his relations to persons and things around him, or as elsewhere expressed, by proof of the surrounding circumstances." 1 Greenl. Ev. §288. Again;—"A written instrument is not ambiguous merely because an ignorant or uninformed person may be unable to interpret it. *It is ambiguous only, when found to be of uncertain meaning, by persons of competent skill and information.*" "A distinction is farther to be observed, between the *ambiguity* of language and its *inaccuracy*," ib. §298, §299. The learned reader will find this whole subject, of the admissibility of parol evidence to affect that which is written, discussed with the most unexampled clearness and perspicuity in 1 Greenl. ch. XV. §§ 275 et seq.

(1) See 1 Jarman, Wills (2d Am. ed.) [358] 351, and cases cited in note; Tucker v. Seaman's Aid Society, 7 Metcalf, 204 to 208; Ambler v. Norton, 4 Hen. & Munf. 23; Kennon v. M'Roberts, 1 Wash. 102; Shermer v. Shermer, 1 Wash. 272; Dabney v. Green, 4 Hen. & Munf. 101; Gay v. Hunt, 1 Murphey, 141.

Mansfield, in a late case, observed, that it was a case which had been impeached upon all occasions (u). It appears to be now clearly settled, that in the *construction* of an agreement or deed, the acts of the parties cannot be taken into consideration (x) (1).

15. Where, however, the words of an *ancient* statute or instrument are doubtful, *contemporaneous* usage, although it cannot overturn the clear words of the instrument (2), will be admitted to explain it; for *jus et norma loquendi* is governed by usage, and the *meaning of things spoken or written must be as it hath constantly been received to be by common acceptance (y). This has been determined in many cases, and such evidence accordingly received (z). And in a late case on this subject, Lord Ellenborough said, it was in constant practice at *nisi prius* to receive evidence of usage to explain doubtful words in old instruments; and it would be difficult to show any just ground of distinction between the information which a Judge might receive to aid his judgment in bank and at *nisi prius* (a) (3).

16. In a late case (b), where a question arose upon the meaning of the words "keep in order," in an agreement to plant trees upon land, Mr. Baron Bayley said, that he should not have thought that the price ought to have been taken into consideration,

(u) See 2 New Rep. 452.

(x) See Clifton v. Walmsley, 5 Term Rep. 564; and see Iggulden v. May, 7 East, 237.

(y) Sheppard v. Gosnold, Vaugh. 169.

(z) Rex v. Varlo, Cowp. 246; Gape v. Handley, 3 Term Rep. 228, n.; Blankley v. Winstanley, 3 Term Rep. 279; Rex v. Bellringer, 4 Term Rep. 810; Rex v. Miller, 6 Term Rep. 268; and see Attor-

ney-general v. Parker, 2 Atk. 576; Attorney-general v. Forster, 10 Ves. jun. 335; Kitchin v. Bartch, 7 East, 53; Bailiffs, &c. of Tewkesbury v. Bricknell, 2 Taunt. 120.

(a) Rex v. Osbourne, 4 East, 327; and see Stammers v. Dixon, 7 East, 200.

(b) Allen v. Cameron, 1 Crompt. & Mees. 832.

(1) Allen v. Kingsbury, 16 Pick. 239. In Stone v. Clark, 1 Metcalf, 381, Mr. Justice Wilde said;—"Where the language of a conveyance is unambiguous, no parol evidence to vary or control its import is admissible. But where the language is doubtful, especially in the description of the land conveyed, then evidence of the practical construction by the parties is admissible to explain and remove the doubt." And he cites Codman v. Winslow, 10 Mass. 149; Adams v. Frothingham, 3 Mass. 362; Allen v. Kingsbury, 16 Pick. 239; Livingston v. Ten Broeck, 16 John. 14. See also Childress v. Ford, 10 Smedes & Marsh. 25; Beacham v. Eckford, 2 Sand. Ch. 116. So, evidence of former transactions between the same parties, has been held admissible to explain the meaning of terms in a written contract, respecting subsequent transactions of the same character. Bourne v. Gatliff, 11 Clark & Fin. 45, 69, 70. See Souverbye v. Arden, 1 John. Ch. 240; Revere v. Leonard, 1 Mass. 93; Cortelyou v. Van Brunt, 2 John. 357; Livingston v. Ten Broeck, 16 John. 14.

(2) Per Wilde J. in Allen v. Kingsbury, 16 Pick. 239; Cortelyou v. Van Brunt, 2 John. 357.

(3) 1 Phil. Ev. (4th Am. ed.) 540 to 543; 1 Arnould Ins. (2d ed.) 75 to 79 and in notes; 1 Greenl. Ev. §292, §293, §294; Atty Genl. v. Boston, 9 Jur. 838; Farrar v. Stackpole, 6 Greenl. 154.

unless, "keeping in order" had been an equivocal expression, but the price must be an ingredient from which a construction of such an agreement as that might be come at. He thought the price was an ingredient in the construction of an agreement, in which equivocal words were used, and Mr. Baron Vaughan was of the same opinion; but Mr. Baron Bolland did not concur in that opinion, because a party may enter into a contract, and undertake to do work for much less than its value. He thought it a dangerous doctrine that the price might be imported into the consideration of the construction of the agreement. Mr. Baron Bayley added, that he should certainly think that the price was not admissible in construing the agreement, had it not been that there was an ambiguity in it; but even with this explanation, Mr. Baron Bolland's appears to be the sounder opinion.

*SECTION XI.

OF PAROL EVIDENCE IN EQUITY TO CORRECT MISTAKES OR FRAUDS.

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| 1. <i>Mistakes and frauds corrected by parol evidence.</i> | 15. <i>Settlement to prevent a forfeiture.</i> |
| 2. <i>Effect of defendant's denial.</i> | 16. <i>Omission of provision on supposed illegality.</i> |
| 4. <i>Issue directed.</i> | 19. <i>Fraud corrected.</i> |
| 5. <i>Whether settlement can be corrected by parol evidence alone.</i> | 20. <i>What amounts to fraud.</i> |
| 10. <i>Mistake proved by instructions and parol evidence.</i> | 21. <i>Third person drawing up minutes contrary to intention.</i> |
| 13. <i>Mistake of purchaser's attorney in conveyance corrected.</i> | 23. <i>Promise to rectify an accidental omission enforced.</i> |
| 14. <i>Proposals to correct by, must be final contract.</i> | 26. <i>Effect of fraud.</i> |
| | 27. <i>No relief against bona fide purchaser.</i> |

The last division of our subject relates to the jurisdiction of equity, in correcting mistakes and fraudulent omissions in agreement and deeds (1).

(1) Even at law the palpable mistake of a word will not defeat the intention of the parties. In a case in the Common Pleas, where the condition of a bond was, that it should be void if the obligor did *not* pay; and performance being pleaded on the ground of literal expression, the Court held the plea bad. *Anon.* Dougl.

1. In *Henkle v. the Royal Exchange Assurance Office* (a), Lord Hardwicke said, that no doubt but equity had jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intention of the parties, on proper proof that would be rectified (1); he thought, however, that in these cases there should be

(a) 1 Ves. 317.

384, cited, 2d edition. See 1 Dow, 147. It seems clearly settled, that words evidently omitted in a will by mistake may be supplied, both at law and in equity, *Tollett v. Tollett*, Ambl. 194; *Coryton v. Hellier*, 2 Bur. 923, cited; and *Doe v. Micklem*, 6 East, 486; see *Lane v. Goudge*, 9 Ves. jun. 225; *Mellish v. Mellish*, and *Phillips v. Chamberlain*, 4 Ves. jun. 45, 51. [1 Jarman, Wills (2d Am. ed.) 405 et seq. Ch. XVII; *Covenhoven v. Shaler*, 2 Paige, 122; *Deakins v. Hollis*, 7 Gill & John. 311; *Cresswell v. Lawson*, 7 Gill & John. 227; *Pickering v. Langdon*, 22 Maine, 429; *Geiger v. Geiger*, 4 McCord, 418; *Lynch v. Hill*, 6 Munf. 114; *Hamilton v. Boyles*, 1 Brevard, 414.] But however evident the mistake may be, the words will not be supplied if the testator's manifest intention would be defeated by the insertion of them. *Chapman v. Brown*, 3 Burr. 1626. See 2 Ves. jun. 365. But now words of inheritance are supplied by the 1 Vict. c. 26, s. 28, 29.

(1) Ante, 156, in note; *Wooden v. Haviland*, 18 Conn. 101; *Clopton v. Martin*, 11 Alabama, 187; 1 Arnould Ins. (2d ed.) 51 and notes; *Gillespie v. Moon*, 2 John. Ch. 585; *Keisselbrack v. Livingston*, 4 John. Ch. 144; *Graves v. Boston Marine Ins. Co.* 2 Cranch, 441; *Hogan v. Del. Ins. Co.* 1 Wash. C. C. 419; S. C. 2 Wash. C. C. 1; 1 Story Eq. Jur. § 155 et seq.; *Langdon v. Keith*, 9 Vermont, 299; *Avery v. Chappel*, 6 Conn. 274; *Perry v. Pearson*, 1 Humph. 431; *Chetwood v. Brittan*, 1 Green Ch. 438; *Inskoe v. Proctor*, 6 Monroe, 316; *Gibson v. Watts*, 1 McCord Ch. 595; *Lingan v. Henderson*, 1 Bland, 249; *Beardsley v. Knight*, 10 Vermont, 185; *Goodell v. Field*, 15 Vermont, 448; *Webster v. Harris*, 16 Ohio, 490; *White v. Denman*, 16 Ohio, 59. In *Tilton v. Tilton*, 9 N. Hamp. 392, Mr. Justice Wilcox, delivering the opinion of the court said:—"In our opinion, a court of equity is competent to correct and reform any material mistake in a deed or other written agreement, whether that mistake be the omission or insertion of a material stipulation; and whether it be made out by parol testimony, or be confirmed by other more cogent proofs. And the same rule applies to contracts within the operation of the statute of frauds. The principle is apparently at variance with a well established rule of evidence, that when the parties have reduced their agreement to writing, the written instrument is the only admissible evidence of the terms of that contract, and is not to be controlled, added to, altered, or varied by parol. Fraud is, however, an exception to the rule, and so, in our judgment, is a case of mistake clearly made out. For it would be a reproach to the jurisprudence of the country, if it were not in its power to relieve from the consequences of a mistake unequivocally established."

In *Peterson v. Grover*, 20 Maine, 363, it was held, that a mistake made in a deed of land should, according to the rules of equity, be reformed, and the mistake corrected, so as to make the deed read as it should have done. See also *Marks v. Pell*, 1 John. Ch. 598, 599; *Washburn v. Merrells*, 1 Day Cas. Err. 139; *Bailey v. Bailey*, 8 Humph. 230; *Richardson v. Bleight*, 8 B. Monroe, 580; *Biodgett v. Hobart*, 18 Vermont, 414; *Miles v. Stevens*, 3 Barr. 21; *Alexander v. Newton*, 2 Grattan, 266; *Parham v. Parham*, 6 Humph. 287; *O'Neil v. Teague*, 8 Alabama, 345; *Christ v. Diefenbach*, 1 Serg. & R. 454; *Miller v. Henderson*, 10 Serg. & R. 292. The power of a court of equity to reform or rectify contracts is held to be clearly not within the equity jurisdiction of the Supreme Judicial Court of Massachusetts. *Leach v. Leach*, 18 Pick. 68; *Dwight v. Pomeroy*, 17 Mass. 303; *Babcock v. Smith*, 22 Pick. 61. In this last case Mr. Justice Morton said:—"The general power of reforming contracts never has been exercised by

the strongest proof possible (1). In a case which was much agitated *before Lord Thurlow, he laid down the rule with great latitude, that if a mistake appears, it is as much to be rectified as fraud (b). So in another case before the same Chancellor, he said that he thought it impossible to refuse, as incompetent, evidence which went to prove that the words taken down were contrary to the concurrent intention of all parties. To be sure, he added, it must be strong, irrefragable evidence, but he did not think he could reject it as incompetent (c).

2. Lord Eldon, observing upon these *dicta*, said, that Lord Thurlow seemed to say that the proof must satisfy the Court what was the concurrent intention of all parties; and he added, *it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement*. In the case before Lord Eldon (d), a specific performance of an agreement was sought with a variation attempted to be introduced by parol on the ground of mistake

(b) *Taylor v. Radd*, 5 Ves. jun. 595, cited.

(c) *Countess of Shelburne v. the Earl of Inchiquin*, 1 Bro. C. C. 338; and see *Cock v. Richards*, 10 Ves. jun. 441.

(d) *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328; see *Attorney-general v. Commissioners of Woods and Forests*, 1 You. & Coll. 559, 583.

this court, and it cannot be pretended that as a distinct branch of equity jurisdiction, we possess it; whether under the head of specific performance, we may not in some cases, exercise a portion of this general authority, we do not think it necessary to inquire. When there is a written executory contract, to be carried into effect by a farther assurance, settlement, conveyance, or specific agreement, and it is imperfectly, or but partially executed, it is not improbable that the court would compel a full execution of the first contract by rectifying and reforming the articles made in pursuance of it, or compelling a more perfect and complete execution of it." 22 Pick. 69, 70. See *Elder v. Elder*, 1 Fairf. 80; *Rogers v. Atkinson*, 1 Kelly, 12; *Collier v. Lanier*, 1 Kelly, 238.

A Court of Chancery cannot reform a contract on the ground of the complainant's ignorance of the law, where the allegation of ignorance is denied by the answer. *Hall v. Reed*, 2 Barbour Ch. R. 500. See *Beebe v. Swartwout*, 3 Gilman, 162; *Champlin v. Laytin*, 18 Wendell, 407; *Wheaton v. Wheaton*, 9 Conn. 96; *Irnham v. Child*, 1 Brown C. C. (Perkins's ed.) 93, cases in note (a); *Crosier v. Acer*, 7 Paige, 138.

(1) Relief will be granted in cases of written instruments, only where there is a plain mistake, clearly made out by satisfactory proofs. *Gillespie v. Moon*, 2 John. Ch. 595, 597; *Lyman v. United Ins. Co.* 2 John. Ch. 630; 1 Story Eq. Jur. §157; *Tilton v. Tilton*, 9 N. Hamp. 392, 393; *Griswold v. Smith*, 10 Vermont, 452; *Cleveland v. Burton*, 11 Vermont, 138; *Goodell v. Field*, 15 Vermont, 448; *Lyman v. Little*, 15 Vermont, 576; *United States v. Munroe*, 5 Mason, 577; *Hunt v. Rousmaniere*, 1 Peters S. C. 13; *Babcock v. Smith*, 22 Pick. 69, Per Morton J.; *Gesley Eq. Ev.* 289; *Coles v. Bowne*, 10 Paige, 526; *Harrington v. Harrington*, 2 How. 701; *Gray v. Wood*, 4 Blackf. 432; *Whitney v. Whitney*, 5 Dana, 330; *Getman v. Beardsley*, 2 John. Ch. 274; 1 Phil. Ev. (4th Am. ed.) 577; *Garter v. Chandler*, 2 Bibb, 246. In reference to the above rule Mr. Justice Story says:—"It is true, that this, in one sense, leaves the rule somewhat loose, as every court is still left free to say, what is a plain mistake, and what are proper and satisfactory proofs. But this is an infirmity belonging to the administration of justice generally." 1 Story Eq. Jur. §157.

and surprise, which was positively denied by the defendant. And the Chancellor said, that he would not say, that upon the evidence without the answer, he should not have had so much doubt whether he ought not to rectify the agreement, as to take more time to consider whether the bill should be dismissed; but as the agreement was to be considered with reference to the answer by which he had positively denied it, he dismissed the bill, but without costs (1).

3. Lord Eldon's decision precisely accords with Lord Thurlow's opinion, which he rightly construed. For in *Lord Irnham v. Child* (e), it was observed by Lord Thurlow, that if a mistake be admitted, the Court would not overturn the rule of equity by varying the deed; but it would be in equity *dehors* the deed. Then it should be proved as much to the satisfaction of the Court, as if it were admitted: "*The difficulty of this is so great, that there is no instance of its prevailing against a party insisting there was no mistake*" (2).

4. Where the Court cannot satisfy itself of the fact, an issue may be directed to try the question. Thus, in the case of the *South Sea Company v. D'Oliff* (f), D'Oliff agreed not to carry goods under certain circumstances; and if information was given *in two months after his return home that he had done so, he was to pay certain stated damages. The instrument was not drawn up until on board the ship, and in a great hurry, and executed there by D'Oliff; who when he got out to sea, and read it over, found it was six months instead of two; and brought a bill to be relieved against that variation in the instrument, the company having brought an action on it. Lord King sent it to an issue; it was tried on a question, whether it was the original agreement it should be two instead of six months. A verdict was given in favor of the plaintiff, that the agreement was designed to be in two, and in consequence of that, Lord Talbot made a decree to relieve the plaintiff against any difficulty by the variation.

(e) 1 Bro. C. C. 92; and see *Hare v. Shearwood*, 3 Bro. C. C. 168; 1 Ves. 601, cited; and see *Pember v. Mathers*, jun. 241; and *Haynes v. Hare*, 1 Hen. 1 Bro. C. C. 52. [Perkins's ed. notes]. Blackst. 659.

(f) 2 Ves. 377, cited; 5 Ves. jun. 601, cited; and see *Gray v. Woods*, 4 Blackf. 432; *Whitney v. Whitney*, 5 Dana, 330; *Peters v. Goodrich*, 3 Conn. 146; ante, 156, in note.

(2) See *Irnham v. Child*, 1 Brown C. C. (Perkins's ed.) 93 and cases in notes; *Gillespie v. Moon*, 2 John. Ch. 585, cited in last preceding note, and ante 156, in note.

5. The hesitation with which parol evidence is received in equity to correct even mistakes in agreements and deeds, is strongly exemplified by a case before Sir William Fortescue(g)(1). Previously to marriage an estate was agreed to be settled on the intended husband for life, remainder to the wife for life, remainder to the sons successively in tail male, remainder to all the daughters. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitations to the sons, where he stopped, and wrote, then go on as in *Pippin v. Ekins*; which was a precedent he delivered to his clerk, to go on from that limitation, and was a right settlement to the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband, without restraining it to that marriage: it was executed with this mistake: the question arose between an only daughter of that marriage and children of the husband's by the second wife. The draft of the attorney was proved, and the settlement in *Pippin v. Ekins*; but the Court would not admit parol evidence of the attorney to be read, and held that the other evidence would not do; that nothing appearing in writing under the hands of the parties, the settlement could not be altered. And Sir Thomas Clark is reported to have said (h), that as to the head of the mistake, he did not give a positive opinion, but he did not think the Court had relied upon parol evidence singly (2).

6. But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted where it is corroborated by other evidence.

7. This doctrine was carried a great way in the case of *Dr. Coldcot v. *Serjeant Hide* (i). Dr. Coldcot having purchased churchlands in fee, under the title of Cromwell, sold them to the defen-

(g) *Hardwood v. Wallis*, 2 Ves. 195, cited; see Rep. t. Sugd. 150.

(h) 1 Dick. 295.

(i) 1 Cha. Ca. 15; 2 Freem. 173; 1

Sid. 238, cited; 14 Car. 2; see *Alexander v. Crosbie*, 1 Lloy. & Goo. v. Sugd. 145;

Mortimer v. Shortall, 2 Dru. & War. 363.

(1) See *Dupree v. McDonald*, 4 Desaus. 211.

(2) But parol evidence, if entirely satisfactory in other respects, will be relied on as sufficient for this purpose. *Gillespie v. Moon*, 585, 602; *Tilton v. Tilton*, 9 N. Hamp. 392; 2 Story Eq. Jur. §1531; 1 ib. §161; *Baugh v. Ramsey*, 4 Monroe, 158; *Huskoe v. Proctor*, 6 Monroe, 316; *Perry v. Pearson*, 1 Humph. 431; *Chetwood v. Brittan*, 1 Green Ch. 438. Still Mr. Justice Story says, that courts of equity interfere with far less scruple to correct mistakes in written agreements where they are made out mainly, or wholly by other preliminary written instruments or memorandums of the agreement, than they do to correct mistakes where parol evidence is admitted for that purpose. 1 Story Eq. Jur. §160. See *Randall v. Willis*, 5 Vesey (Sumner's ed.) 262 and notes; *Babeock v. Smith*, 22 Pick. 69, 70; *Rogers v. Atkinson*, 1 Kelly, 12; *Collier v. Lanier*, 1 Kelly, 238.

dant's testator, and entered into general covenants for the title. Upon the Restoration the estate was avoided, and upon an action on the covenants, damages to the value of the purchase-money were recovered. A bill was then filed to be relieved against the recovery at law, which suggested a surprise upon the plaintiff, in getting him to enter into general covenants, and that it was declared by the parties, when the deed was executed, that it was intended Dr. Coldcot should not undertake any further than against himself; and *there being some proof of this declaration*, it was decreed by the Lord Chancellor and Master of the Rolls, that the defendant should acknowledge satisfaction on the judgment, *and pay costs*. And the reporter says, a like case to this between *Farrer v. Farrer* was heard and decreed after the same manner, about six months ago.

8. A case, nearly similar, occurred about eleven years afterwards (*k*); but it appeared that all the covenants except the one upon which judgment had been obtained at law, were restrained to the acts of the vendor, *and that the vendor sold only such estate as he had*.

9. This last case was quoted in a case in the Common Pleas before Lord Eldon (*l*), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from any thing *dehors*. In a still later case in the same Court (*m*), Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct marriage articles where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence *that the vendor sold only such estate as he had*, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Dr. Coldcot and Serjeant Hide, and is still clearly admissible.

10. Thus in *Young v. Young* (*n*), the plaintiff married Lucy, a defendant, and an infant; the husband stated, or drew by way of

(*k*) *Fielder v. Studley*, Finch, 90.

575.

(*l*) *Browning v. Wright*, 2 Bos. & Pul.

(*n*) 1 Dick. 295, cited. See 1 Dick. 303,

26. (*m*) *Hesse v. Stevenson*, 3 Bos. & Pul.

304.

*instructions to his attorney, what the wife's fortune then was, and agreed to add as much to be settled in strict settlement, and likewise stated that the intended wife had a prospect of an additional fortune; to which he agreed, provided it did not exceed 1,000*l.*, to add a like sum, to be likewise settled strictly, and he to have the excess. The settlement was prepared according to the instructions; but the solicitor having, in the margin of the draft, added double the sum, the settlement was prepared and executed according to that mistake. Parol evidence was admitted to prove the mistake; that is, the settlement was first shown to differ from the written instructions, and parol evidence of the counsel and attorney was then received, to prove the mistake.

11. This equity was administered in the case of *Thomas v. Davis*, before cited (*o*), where it clearly appeared, that the estate in question was not intended to be comprehended in the general words. This appeared from many circumstances, but particularly from the description of the estate given by the husband to the attorney by way of instructions, which described the lands, and did not include Rigman Hill; and the attorney proved that he did not know of this estate, and that he introduced general words, merely to guard against any wrong or imperfect description of the lands actually intended to pass. It was objected, that the admission of the attorney's evidence was in direct contradiction to the statute of frauds; but Sir Thomas Clark was clear it might be read, and accordingly admitted it (I) (1).

(*o*) *Supra*, p. 177; 1 Dick. 301; Reg. Lib. B. 1757, fol. 33, 34.

(I) The judgment is very inaccurately stated in the report. After addressing himself to the general words, the Master of the Rolls is stated to have said, Do these words comprise Redmond [Rigman] Hill? I do not think they do include Redmond Hill; but other words do. If Redmond Hill was not intended, why was the wife to join; and why did she join?—This is absolute nonsense. The wife joined because she was interested in the settled estates; and the opinion of the Court was, that the general words did include Rigman Hill. The editor's marginal abstract of this case shows how difficult it is to understand the report of it.

(1) Where a marriage settlement does not conform to the intention of the parties, either through mistake, or the fraud of one of the parties, it will be corrected by a court of equity. *Scott v. Duncan*, Dev. Eq. R. 403. See *Allen v. Rumph*, 2 Hill Ch. 3; 1 Story Eq. §160; *Randall v. Willis*, 5 Sumner's Vesey, 262 and notes; *Babcock v. Smith*, 22 Pick. 69, 70; *Flemings v. Willis*, 2 Call, 5; 1 Phil. Ev. (4th Am. ed.) 577; *Tabb v. Archer*, 3 Hen. & Munf. 399; *Gaillard v. Porcher*, 1 M'Mullan, Eq. 358; *Smith v. Maxwell*, 1 Hill Ch. 101; *Gause v. Hale*, 2 Iredell Eq. 241, 243.

12. So in *Rogers v. Earl (p)*, instructions were given, previously to marriage, for a settlement of the wife's estate on the husband during his life, if he and his wife should so long live, remainder to the wife for life, remainder to the issue of the marriage in strict settlement, remainder to such uses as the wife should appoint; and *a draft of a settlement was drawn accordingly. And after the limitation to the husband, it stood thus: And immediately after the decease of the husband, then to the wife, &c.; and proper limitations were inserted to trustees to preserve contingent remainders. When the wife saw the draft, thinking she was past child-bearing, she objected to the limitations to the issue, and they were directed to be struck out. The attorney, by mistake, not only struck out those limitations, but also the limitation to the wife for life, and the subsequent limitation to trustees to preserve, and the deed was executed without the mistake being discovered, whereby, as the bill stated, the said power for appointing the reversion of the premises was made to take place on the decease of the plaintiff generally, though the limitation to him was only during the joint lives. The wife exercised her power by deed in favor of her husband during his life, and then by will gave him the fee, and then died in his life-time. Her heir at-law insisted that the use resulted to him during the husband's life, and that there being no trustee to preserve contingent remainders, the devise in the will as an execution of the power, not taking effect till the determination of the particular estate, was void, and brought an ejectment against the husband, and obtained a verdict (I). The husband then filed a bill for an injunction, and to rectify the mistake in the settlement. The defendant, by his answer, urged that the draft of the settlement might have been altered with a view to support the husband's claim, and insisted that parol evidence could not be received; but Sir Thomas Clark decreed, that the power appeared to have been designed so far to extend as to enable her to dispose of the interests in the estates after the determination of the coverture, and during the life of her husband, as well as to dispose of

(p) 1 Dick. 294. Note, the facts are not stated in the report; they are extracted from the Registrar's book; see Reg. Lib. B. 1756, fol. 205; see *Pritchard v. Quinchant*, Ambl. 147; 5 Ves. jun. 596, n. (a); and *Barstow v. Kilvington*, 5 Ves.

jun. 593; and see *Nelson v. Nelson*, Nels. Cha. Rep. 7; *Shaw v. Jakeman*, 4 East, 201; *Duke of Bedford v. Marquis of Abecorn*, 1 Myl. & Cra. 312; *Marquis of Exeter v. Marchioness of Exeter*, 3 Myl. & Cra. 321.

(I) The first point at least was clear at law, but the defendant set up an old term as a bar to the plaintiff's right to recover. The defense, however, did not succeed. See *Farmer dem. Earl v. Rogers*, 2 Wils. 26.

the inheritance of the estates after her husband's decease, and ordered the settlement to be rectified accordingly ; but without costs on either side.

13. In the last case upon this subject (*q*), a conveyance of a portion of church-tithes upon a purchase was made, contrary to what was considered to be the true construction of the written agreement, subject to a proportion of the rent reserved by the lease of the tithes ; and upon proof that this was done by the mistake of the *purchaser's* attorney, and that the rent had not been demanded *for several years, the deed was after the lapse of several years rectified, and made conformable to the written agreement.

14. To enable equity to amend an instrument by proposals, it must of course be shown that they constituted the final contract of the parties, for they may have been varied by subsequent agreement before the execution of the deed ; in which case there would be no mistake to rectify (*r*).

15. If a settlement be made contrary to the intention of the parties, merely to prevent a forfeiture (*I*), parol evidence is admissible of the real intent of the parties (*s*), and the settlement will be rectified in conformity with it.

16. Where parties omit any provision in a deed, on the impression of its being illegal, and trust to each other's honor, they must rely upon that, and cannot require the defect to be supplied by parol evidence.

17. Thus in *Lord Irnham v. Child* (*t*), it appeared that Lord Irnham treated with Child for sale of an annuity. Upon settling the terms, it was agreed that the annuity should be redeemable ; but both parties supposing that this appearing upon the face of the transaction would make it usurious, it was agreed that the grant should not have in it a clause of redemption ; and it was accordingly drawn and executed without such a clause. Lord

(*q*) *Rob v. Butterwick*, 2 Price, 190 ; and see *Beaumont v. Branley*, Turn. & Russ. 41.

(*r*) *Marquis of Breadalbane v. Marquis of Chandos*, 2 Myl. & Cra. 711.

(*s*) *Harvey v. Harvey*, 2 Cha. Ca. 180, decided the same way, first by Sir Har-

bottle Grimston, then by Lord Nottingham, and afterwards by Lord Chancellor Jefferies ; and see *Fitzgib.* 213, 214 ; see *Stratford v. Powell*, 1 Ball & Beaty, 1.

(*t*) 1 Bro. C. C. 92. [Perkin's ed. notes.]

(*I*) In this case the settlement was to prevent the estate from being sequestered on account of the husband having been in arms for Charles the First. The decree was made in the reign of James his son. So that as to the *nature* of the forfeiture, it is evident that the relief of equity would not have been afforded, for the purpose of *upholding* the settlement, except under the Restoration !

Thurlow refused to supply the omission. A similar decision was made by Mr. Justice Buller, when sitting in Chancery for the Lord Chancellor (*u*); and two similar determinations were made by Lord Kenyon, when Master of the Rolls (*x*).

18. Upon these cases Lord Eldon observes, that they went upon an indisputably clear principle, that the parties did not mean *to insert in the agreement a provision for redemption, because they were all of one mind that it would be usurious: and they desired the Court to do not what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention. The answer is, they admit it was not to be in the deed; and why was the Court to insert it, where two risks had occurred to the parties; the danger of usury, and the danger of trusting to the honor of the party (1)?

19. But fraud is in equity an exception to every rule. In the case of Lord Irnham *v.* Child, Lord Thurlow distinctly said, if the agreement had been varied by fraud, the evidence would be admissible (2). If the bill stated that the clause was intended to be inserted, but it was suppressed by fraud, he could not refuse to hear evidence read to establish the rule of equity. Lord Kenyon advanced the same doctrine in the cases before him, and Mr. Justice Buller also thought that parol evidence was, in such cases, admissible (*y*).

20. The only difficulty in these cases is, to ascertain what shall be deemed fraud. If parties merely agree to a term, and then execute an instrument in which that term is omitted, without objecting to the omission of it, the Court cannot relieve the injured

(*u*) *Hare v. Shearwood*, 1 Ves. jun. 241; 3 Bro. C. C. 168. [Perkins's ed. notes.] See and consider *Haynes v. Hare*, 1 Hen. Blackst. 659 (1).

(*x*) *Lord Portmore v. Morris*, 2 Bro. C. C. 219; [Perkins's ed. notes.] 1 Hen. Blackst. 663, 664; *Rosamond v. Lord*

Melsington, 3 Ves. jun. 40, n.

(*y*) And see *Taylor v. Radd*, 5 Ves. jun. 395, cited; *Henkle v. R. E. A. Office*, 1 Ves. 317; and see *Pitcairne v. Ogbourne*, 2 Ves. 375; *Countess of Shelburne v. the Earl of Inchiquin*, 1 Bro. C. C. 338.

(1) Perhaps this case does not belong to this line of cases, but should be classed with those in which a term is omitted by mistake; of which vide *supra*.

(1) See *Gunter v. Thomas*, 1 Iredell Eq. 199.

(2) 1 Brown C. C. (Perkins's ed.) 93 note (b) and cases cited; *Pember v. Mathers*, 1 ib. 54 and note; *Phyfe v. Wardell*, 2 Edw. Ch. 47; 1 Story Eq. Jur. §166; *O'Neil v. Teague*, 8 Alabama, 345; *Jarvis v. Palmer*, 11 Paige, 650; *Renshaw v. Gans*, 7 Barr. 117.

party (z). So where a lessor drew a lease for one year, instead of twenty-one, and then read it for twenty-one years, the lessee brought his bill to be relieved; but as he could read, it was deemed his own folly; and as the case was within the statute, his bill was dismissed with costs (a). Again, where in a lease the right to enter, cut, and carry away the trees, was reserved to the lessor, the lessee went into parol evidence to show that that was contrary to the original agreement, and proved a conversation previously to the execution of the lease, in which the landlord assured the lessee he should not cut the timber, and only reserved it in order that all his leases might be uniform. The plaintiff's counsel, however, gave up this part of the bill at the hearing (b), and Lord Rosslyn treated it as clearly wrong. So I am told that in a very recent case at law (c), where a warrant of attorney was given to confess judgment on the assurance of the creditor that no execution should issue for three years, and execution was, contrary to this parol agreement, issued immediately, the Court inclined, that as the defendant knew the contents, and had sufficient time to read the warrant of attorney, they could not relieve; and yet a court of law considers itself to have considerable controlling power over its own judgments entered up under warrants of attorney, where the party entering them up has been guilty of a fraud (d). The case, however, went off on another ground.

21. In the *Countess of Shelburne v. the Earl of Inchiquin* (e), Lord Thurlow said, if two persons entrust a third person to draw up minutes of their intention, and such person does not draw them according to such intention, that case might be relieved, because that would be a kind of fraud.

22. And it is said, that in the case of *Jones v. Sheriffe* (f), there were heads of an intended lease taken by an attorney in writing; but upon proof that some other clauses were agreed on between the parties at the same time, the Court decreed that those clauses should be put into the lease, notwithstanding the counsel on the other side strenuously insisted on the statute of frauds.

23. And if either party object to a conveyance, on the ground of a term of the agreement being omitted, and the other party

(z) See *Rich v. Jackson*, 4 Bro. C. C. 514; *et supra*, p. 164.

(a) *Anon. Skin.* 159; but *qu.* the authority of this case.

(b) *Jackson v. Cator*, 5 Ves. jun. 688.

(c) *Gennor v. Macmahon*, M. T. 1806, B. R.

(d) See 1 H. Blackst. 63, 664.

(e) 1 Bro. C. C. 350; and see *Crosby v. Middleton*, 3 Cha. Rep. 99; *Langley v. Brown*, 2 Atk. 195; *Baker v. Payne*, 1 Ves. 6.

(f) 9 Mod. 88, cited.

promise to rectify it, whereupon the deed is executed, a specific performance of the promise will be enforced.

24. Thus in *Pember v. Mathers* (*g*), a bill was filed for a specific performance of a parol agreement by a purchaser of a lease under written conditions, to indemnify the vendor against the rent and covenants; and it was objected, on the part of the defendant, that the evidence was inadmissible, upon the ground, that where the parties have entered into a written agreement, no parol evidence can be admitted to increase or diminish such agreement. The rule, Lord Thurlow said, was right; but where the objection was originally made, and promised by the other party to be rectified, it comes amongst the string of cases where it is considered as a fraud. Then the evidence is admissible. There being some doubt as to the fact, Lord Thurlow ordered it to go to law upon an issue, whether there was such a promise on the day of the execution of the agreement. Upon the trial, the jury found there was such a promise, and the plaintiff had a decree for a specific performance.

*25. So we have before seen, that where it is stipulated that the agreement shall be reduced into writing, and either party fraudulently prevents the agreement from being put into writing, equity will perhaps relieve the injured party (*h*) (1).

26. And it is perfectly clear, that where fraud is distinctly proved, or the jury infer it from the circumstances, an agreement is invalid at law, as well as in equity (*i*) (2); but the reducing the agreement to writing is, in most cases, an argument against fraud.

27. But it must be remarked, that a deed will not be rectified in equity on the ground of mistake or fraud, to the prejudice of a *bona fide* purchaser, without notice.

28. Thus in the case of *Thomas v. Davis* (*k*), although the lands passed at law, yet as the mistake was clearly proved, the words were restrained as between the person claiming under the wife,

(*g*) 1 Bro. C. C. 52; [and notes] see 319; *Emanuel v. Dane*, 3 Camp. Ca. 299; *Solomon v. Turner*, 1 Stark. Ca. 51.

(*h*) Vide *supra*, p. 139.

(*i*) *Haigh v. De la Cour*, 3 Camp. Ca. fol. 33, 34; 1 Dick. 301.

(1) *Jenkins v. Eldridge*, 3 Story C. C. 181, 290, 293; ante, 125 and notes, 139; 2 Story Eq. Jur. §768; *Phyfe v. Wardell*, 2 Edwards Ch. 47; *Kennedy v. Kennedy*, 2 Alabama, 571; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Wesley v. Thomas*, 6 Harr. & John. 24; *Watkins v. Stockett*, 6 Harr. & John. 435. The law is otherwise in Mississippi. *Box v. Stanford*, 13 Smedes & Marsh. 93.

(2) *Chitty Contr.* (8th Am. ed.) 587 et seq. and notes; *Daniel v. Mitchell*, 1 Story C. C. 172.

whose estate was comprised by mistake, and the heir of the husband, to whom the estate had passed by the error ; but the same equity was not administered against the mortgagee, who was left in possession of the legal right which the generality of the conveyance had invested him with.

*CHAPTER IV.

OF THE CONSEQUENCES OF THE CONTRACT.

SECTION I.

OF THE PURCHASER'S TITLE FROM THE TIME OF THE CONTRACT.

1. *Seller trustee of estate for purchaser.*
2. *Bankruptcy does not discharge the contract.*
3. *Assignees put to their election.*
5. *Extent prevails over contract.*
6. *Purchaser without notice also.*
7. *Death of party immaterial.*
8. *Purchase-money assets of vendor.*
9. *Mortmain Act.*
10. *Purchaser not to cut timber.*
11. *Operation of contract where the purchaser is tenant.*
13. *Conveyance destroys covenants in lease.*
14. *Purchaser's power over the estate.*
- 15 } *His power of devising before 1*
to } *Vict. c. 26, viz.*
42 }
21. *Effect of devise where the purchaser had a term of years.*
22. *Revocation of previous bequest of term.*
24. *Conveyance did not operate a revocation.*
25. *Unless new uses introduced.*
26. *Estates contracted for after the will not affected by it.*
27. *Republication.*
29. *Heir put to his election.*
30. *Cautions in purchasing from heir.*
31. *Copyholds.*
32. *Contract revoked seller's will.*
34. *Where the agreement could not be enforced in equity, qu.*
37. *Or has been abandoned, qu.*
38. *Devise by seller after the contract.*
39. *Estate converted, although election to buy given to purchaser.*
41. *But devisee by description entitled.*
43. *So of timber.*
45. *Right of pre-emption enforced.*
47. *Right of next of kin of vendor.*
- 49 } *Purchaser's right to devise since*
to } *1 Vict. c. 26.*
69 }
52. *Operation of Act on Atcherley v. Vernon.*
54. *Operation upon previous bequest where the purchaser was a termor.*
56. *Operation of the Act upon general bequest and general devise, where the purchaser is a termor.*
57. *Where the fee is conveyed or the term assigned to attend.*
58. *Where the term is specifically bequeathed.*
60. *Operation of 8 & 9 Vict. upon satisfied terms.*
61. *No form of conveyance a revocation.*
62. *Cautions in purchasing of heir.*
63. *Contract to sell revokes the seller's will.*
64. *Agreement void in equity not a revocation.*
65. *Nor an agreement abandoned.*
66. *Operation* of Act on Knollys v. Shepherd.*
67. *And on Lawes v. Bennett.*
68. *General operation of Act.*
69. *Operation of Act on Arnold v. Arnold.*
70. *Demonstrative legacy.*
71. *Where heir of purchaser entitled.*
72. *His power over estate.*

73. *Executor must pay for the estate.*

75. *Death of vendor or purchaser and no title.*

76. *Where estate directed to be bought cannot be obtained.*

*1. EQUITY looks upon things agreed to be done, as actually performed (a), (I) ; consequently, when a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold (b) (1), and the purchaser as a trustee of the purchase-money for the vendor (c). [And every subsequent purchaser from either, with notice, becomes subject to the same equities, as the party would be, from whom he purchased (2). So that, if a person, who has contracted to sell land, sells it to a third person, the second purchaser, if he have notice at the time of the purchase of the previous contract, will be compelled to convey the property to the first purchaser (3).]

2. Therefore the contract will not be discharged by the bankruptcy of either the vendor (d)(4) or vendee (e), and the observation of the Chief Baron in *Goodwin v. Lightbody* (f), that if one were to sell an estate, and, before the conveyance should be complete, were to become a bankrupt, his assignees might choose whether

(a) Francis's Maxims, max. 13; 1 Treas. Eq. chap. 6, sec. 9. See *Callaway v. Ward*, 1 Ves. 318, cited.

(b) *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Cha. Ca. 39; and *Lady Fohaine's case*, cited *ibid.*; and see 1 Term. Rep. 601; and *Green v. Smith*, 1 Atk. 572.

(c) *Green v. Smith*, *ubi supra*; *Pollex-*

fen v. Moore, 3 Atk. 272.

(d) *Orlebar v. Fletcher*, 1 P. Wms. 737.

(e) See 3 Ves. jun. 255; and *Bowles v. Rogers*, 6 Ves. jun. 95, n.; *Whitworth v. Davis*, 1 Ves. & Bea. 545.

(f) *Dan.* 156; the observation was, perhaps, made with reference to an act of bankruptcy prior to the contract.

(I) A lessee insured his house, the lease expired, and he contracted for a new lease. Then the house was burned, and the office insisted that at the time of burning it was not the plaintiff's house; but Lord Chancellor King, and afterwards the House of Lords, held otherwise. See printed cases, *Dom. Proc.* 1730.

(1) *Kidd v. Dennison*, 6 Barbour Sup. Ct. Rep. 9; *Swartwout v. Burr*, 1 ib. 499; 1 Story Eq. Jur. §64 g; 2 ib. §789, §790, §1212; *Waddington v. Banks*, 1 Brock. 97; *Craig v. Leslie*, 3 Wheaton, 563; *Van Wyck v. Alliger*, 6 Barbour Sup. Ct. Rep. 511; *Edgerton v. Peckham*, 11 Paige, 359; *McKay v. Carrington*, 1 McLean, 50; *Crawford v. Bertholf*, Saxton, 458.

(2) 2 Story Eq. Jur. §789; *Champion v. Brown*, 6 John. Ch. 398, 403; *Muldrow v. Muldrow*, 2 Dana, 387; *Hampton v. Edelen*, 2 Harr. & John. 64; *Hoagland v. Latourette*, 1 Green Ch. 254; *Langdon v. Woodfolk*, 2 B. Monroe, 105.

(3) *Hoagland v. Latourette*, 1 Green Ch. 254; *Langdon v. Woolfolk*, 2 B. Monroe, 105. See *Cox v. Osborn*, 1 A. K. Marsh. 311; *Frailty v. Langford*, ib. 363; *Liggett v. Wall*, 2 ib. 149; *Pugh v. Bell*, 1 J. J. Marsh. 403; *Hunter v. Wallace*, 1 Tenn. 239; *Dunlap v. Stetson*, 4 Mason, 349; post, 254; *Wadsworth v. Wendell*, 5 John. Ch. 224.

(4) See *Tyree v. Williams*, 3 Bibb, 366.

they would perform the contract or not, is not well founded. But an act of bankruptcy, although no commission had issued, heretofore prevented the execution of the agreement, as neither a buyer nor a seller could be assured that a commission might not issue in due time, in which case he could not retain the estate or money against the assignees (*g*). But this is now in part altered by an act (*h*), which protects a *purchaser* who bought without notice of a prior act of bankruptcy (*i*). And a payment (not being a fraudulent preference) to a seller who had not notice of any act of bankruptcy committed by the purchaser, seems to be protected (*j*).

3. The Bankrupt Act, 6 Geo. 4 (*k*), enacts, that if any bankrupt shall have entered into any agreement for the purchase of any estate or interest in land, the vendor thereof, or any person claiming under him, if the assignees of such bankrupt shall not (upon being thereto required) elect whether they will abide by and execute such agreement, or abandon the same, shall be entitled to apply by petition to the Lord Chancellor, who may thereupon *order them to deliver up the said agreement, and the possession of the premises, to the vendor, or person claiming under him, or may make such other order therein as he shall think fit.

4. Where a contract for sale is overreached by an act of bankruptcy before the conveyance, it seems to have been supposed that the assignees may compel the purchaser to complete the contract (*l*) ; but the case in which this point arose was decided upon the ground that the purchaser submitted to perform the contract, provided a good title could be made.

5. An agreement for sale, even with part of the money paid, has no effect against an extent by the Crown ; for whilst no conveyance having been executed, the fee is in the seller, the agreement has no operation against the extent (*m*).

6. And if one agree to purchase an estate, and take a contract or covenant that the owner will sell that estate, and the latter should sell or mortgage it to another person who has no notice, the first purchaser has not any right to call on the second purchaser

(*g*) *Lowes v. Lush, Franklin v. Lord Brownlow*, 14 Ves. jun. 547, 550. 82 ; 2 & 3 Vict. c. 29.

(*h*) 2 Vict. c. 11, s. 12 ; and see 2 & 3 Vict. c. 29, and 7 & 8 Vict. c. 90, as to Ireland.

(*i*) See *post*, ch. 12, and ch. 21.

(*j*) See and consider 6 Geo. 4, c. 16, s.

(*k*) C. 16, s. 76.

(*l*) See the marginal abstract of *Goodwin v. Lightbody*, Dan. 153.

(*m*) *Rex v. Snow*, 1 Price, 220, n. See 2 Vict. c. 11, s. 8, 9, 10.

for the legal estate, but the latter may protect himself by the legal estate against the former (*n*) (1).

7. The death of the vendor or vendee before the conveyance (*o*), or surrender (*p*), or even before the time agreed upon for completing the contract, is in equity immaterial (*q*) (2).

8. If the vendor die before payment of the purchase-money, it will go to his executors, and form part of his assets (*r*) (3), and even if a vendor reserve the purchase-money, payable as he shall appoint by an instrument, executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets (*s*). If the contract is to be performed at a period which takes place after the vendor's death, his heir at law, and not his executor, is entitled to the intermediate rents (*t*).

9. If the estate is under a contract for sale at the date of the will, a devise of it to be sold for a charity, will not give the purchase-money to the charity, in consequence of the mortmain act, as it is called (*u*), although this point was in the first instance otherwise decided (*v*).

*10. A vendee being actually seised of the estate in contemplation of equity, must, as we shall hereafter see, bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim (*w*); but if he obtain possession of the estate before he has paid the purchase-money, and begin to cut timber, equity will grant an injunction against him (*x*).

11. If the purchaser was tenant at will of the estate, the contract determines the tenancy (*y*). And even if he was tenant for a term certain, the agreement determines the relation of landlord and

(*n*) 8 Price, 488, 489, *per* Richards, C.
B.

(*o*) Paul v. Wilkins, Toth. 106.

(*p*) Barker v. Hill, 2 Cha. Rep. 113.

(*q*) Winged v. Lefebury, 2 Eq. Ca. Abr. 32, pl. 43; cases cited *ante*, note (*b*).

(*r*) Sikes v. Lister, 5 Vin. Abr. 541, pl. 28; Baden v. Earl of Pembroke, 2 Vern. 213; Bubb's case, 2 Freem. 38; Smith v. Hibbard, 2 Dick. 712; Foley v. Percival, 4 Bro. C. C. 419; and see Gilb. Lex Prætor. 243; Eaton v. Sanxter, 6 Sim. 517.

(*s*) Thompson v. Towne, 2 Vern. 319. 466.

(*t*) Lumsden v. Fraser, 12 Sim. 263.

(*u*) Harrison v. Harrison, 1 Russ. & Myl. 71; 1 Taunt. 273.

(*v*) Middleton v. Spicer, 1 Bro. C. C. 201.

(*w*) See *post*, ch. 6.

(*x*) Crockford v. Alexander, 15 Ves. jun. 138.

(*y*) See *post*, that a purchaser generally cannot be charged as tenant.

(1) See Dennison v. Robinett, 2 Harr. John. 55; Frost v. Beekman, 1 John. Ch. 298; Benzien v. Lenoir, 1 Car. Law Rep. 508.

(2) Muldrow v. Muldrow, 2 Dana, 387; Livingston v. Newkirk, 3 John. Ch. 312, 316; Rutherford v. Green, 2 Iredell Ch. 121.

(3) 1 Story Eq. Jur. §64 g; Craig v. Leslie, 3 Wheaton, 563, 577.

tenant, and in equity the landlord cannot call for rent (z). Lord Eldon laid down the rule thus generally, in a case in which he had not to decide the point. But in a late case (a), where a tenant from year to year agreed to purchase, and was, by the implied terms of the contract, entitled to a good title, it was held that his tenancy did not cease. For where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. If, the Court observed, by the true construction of the agreement, the defendant at a certain time was to be absolutely a debtor for the purchase-money, paying interest on it, and to cease to pay rent as tenant, a tenancy at will would probably be created after that time, and the acceptance of such new demise at will would then operate as a surrender of the former interest by operation of law. But if the agreement is conditional to purchase only provided a good title should be made out, and to pay the purchase-money when that should have been done and the estate conveyed, there is no room for implying any agreement to hold as tenant at will in the meantime, the effect of which would be absolutely to surrender the existing term, whilst it would be uncertain whether the purchase would be completed or not.

12. This case proves that the Courts will not hold a lessee's interest to have determined to his prejudice, unless compelled to come to that conclusion by the form of the contract; nor would the tenant be allowed to baffle the seller, and to withhold both the rent and the purchase-money. But it is proper upon a sale of an estate to the tenant to provide for the payment of the rent until the completion of the purchase, if that be the intention. When the purchase *is completed, there will no longer be any difficulty, for the purchaser will be made to pay interest or rent for the time past, according to the provisions of the contract or the rights springing out of it.

13. Where the relation of vendor and purchaser is formed by a conveyance of the inheritance, that puts an end to the covenants in the lease, though ever so large and general, which existed between the parties as lessor and lessee (b), and it is immaterial whether the lease was granted by the one to the other or not; it is sufficient

(z) Daniels v. Davison, 16 Ves. jun. 252, 253.

(a) Doe v. Stamion, 1 Mee. & Wels. 695.

(b) See 1 Bligh, 69.

that the relation of landlord and tenant subsisted between them under the lease. Lord Eldon observed, that undoubtedly the vendor may concede the advantage which by law he derives from the new relation of vendor and vendee, and the vendor may warrant at the risk of damages, the privileges which he as lessor had agreed to give to the lessee before he became purchaser. But he added, such a contract between vendor and vendee must be expressed in terms which are free from all doubt or ambiguity. The terms of a contract so special must indicate unequivocally what was the intention of the parties (*c*).

14. It is a consequence of the same rule, that a purchaser may sell or charge the estate, before the conveyance is executed (*d*)(1); and a judgment will bind his equitable interest (*e*); but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved (*f*).

15. The power of devising is so greatly enlarged by the 1st Vict. c. 26, whilst the old law is still applicable to all titles where the will was made before the 1st of January 1838, and not since republished or revived by any codicil executed as required by the above statute, that it may be expedient, first, to consider the old law, as it applies to the latter class of cases; and secondly, the new law, which applies to all wills executed upon or subsequently to the 1st of January 1838.

16. First, then, as to the law applicable to wills executed before the 1st of January 1838, and not republished or revived by any codicil since that date.

17. A man having contracted for an estate, might devise it, if freehold (*g*), before the conveyance; and if copyhold, before the *surrender (*h*); and that, although the estate was contracted for at

(*c*) 1 Bligh, 76.

(*d*) Seton v. Slade, 7 Ves. jun. 265; and see 1 Ves. 220; and 6 Ves. jun. 352; Wood v. Griffith, 12 Feb. 1818; MS. see *post*; 2 Ball & Beat. 522.

(*e*) Baldwin v. Belcher, 1 Jo. & Lat. 18.

(*f*) See Dyer v. Pulteney, Barnard. Rep. Cha. 160; a very particular case.

(*g*) Darri's case, 3 Salk. 85; Milner v. Mills, Mose. 123; Alleyn v. Alleyn,

Mose. 262; Atcherley v. Vernon, 10 Mod. 518; Gibson v. Lord Montfort, 1 Ves. 485.

(*h*) Davie v. Beardsham, 1 Cha. Ca. 39; Nels. Cha. Rep. 76; 3 Cha. Rep. 2; Greenhill v. Greenhill, 2 Vern. 679; Prec. Cha. 329; Atcherley v. Vernon, 10 Mod. 518; Robson v. Brown, Oct. 1740, S. P.; and see 9 Ves. jun. 510; Marston v. Roe, 8 Adol. & Ell. 14.

(1) See Barton v. Rushton, 4 Desaus. 373; 2 Story Eq. Jur. §790, §793, §1212; Craig v. Leslie, 3 Wheaton, 563; Peter v. Beverly, 10 Peters (S. C.) 532, 533.

a future day (*i*), or the contract was entered into by a trustee for him (*k*); and the devisee would be entitled to have the estate paid for out of the personal estate of the purchaser (*l*) (1).

18. The rule that an estate contracted for might be devised before it was conveyed or surrendered to the purchaser, had become a land-mark, and could not have been shaken without endangering the titles to half of the estates in the kingdom. The applicability of the rule to freehold estates had, I believe, never been questioned but in *Ardesoife v. Bennet* (*m*), where the point arose as to a copyhold estate, Sir Thomas Sewell decided the case on another ground, and appears to have avoided sanctioning the rule in question; and in a manuscript note of this case by the name of *Wilson v. Bennet*, it is said that the Master of the Rolls was of opinion that the copyhold estate did not pass by the will. This opinion was clearly extra-judicial, and cannot be deemed subversive of the numerous cases which have established the contrary doctrine; and indeed, in a case before Sir Thomas Sewell, a few years after that of *Ardesoife v. Bennet*, he seems to allude to a devise of a copyhold estate contracted for, as sanctioned by practice (*n*).

19. An estate contracted for will pass by a general devise of all the lands purchased by the testator, although he may have purchased some estates which have been actually conveyed to him, and would therefore of themselves satisfy the words of the will (*o*).

20. On the other hand, it seems that estates recently purchased *and actually conveyed*, will pass with estates contracted for, by a general devise of all the manors, &c. for the purchase whereof the testator has *already* contracted and agreed (*p*), (I). But a devise *of estates “for the purchase whereof the testator has only contracted and agreed,” would not pass estates actually conveyed to

(*i*) Commissioner Trimuel's case, Mose. 265, cited; and see *Acherley v. Vernon*, 10 Mod. 518; *Gibson v. Lord Montfort*, 1 Ves. 485.

(*k*) *Greenhill v. Greenhill*, 2 Vern. 679.

(*l*) *Milner v. Mills*, Mose. 123; *Broome v. Monck*, 10 Ves. jun. 597.

(*m*) 2 Dick. 403; and see 15 Ves. jun.

391, 392, n.

(*n*) *Floyd v. Aldridge*, 1777, 5 East, 137, cited; and see *Vernon v. Vernon*, 7 East, 8.

(*o*) *Acherley v. Vernon*, 10 Mod. 518.

(*p*) *St. John v. Bishop of Winton*, Cowp. 94; *Lofft*, 113, 349, S. C.; and 2 Blackst. 930.

(I) This, however, must depend upon the particular circumstances of each case. The case referred to can scarcely be cited as a binding authority establishing a general rule. It seems that the House of Lords was taken by surprise in affirming the judgment.

(1) *Livingston v. Newkirk*, 3 John. Ch. 312; *M'Kinnon v. Thompson*, 3 John. Ch. 307, 310; *Malin v. Malin*, 1 Wendell, 625.

him before the will, unless perhaps they were recently purchased, and the testator had not contracted for any other estate.

21. If a man possessed of a term of years contract for the purchase of the inheritance, the term by construction of equity, instantly attends the inheritance; and therefore, by a devise of the estate subsequently to the contract, the fee-simple would have passed although not actually conveyed, and the term as attendant on it (*q*).

22. And if the purchaser had, previously to the purchase, made his will, by a general bequest in which the term would have passed, yet the legatee would not be entitled to it, although the bequest were not expressly revoked; because the term, by the construction of equity, attended the inheritance immediately on the purchase of the fee, and it must therefore follow it in its devolution on the heir or devisee (*r*).

23. The same rule, it seems, must prevail where the term is even *specifically* bequeathed; for if the fee had been actually conveyed, the conveyance would have operated as a revocation (*s*); and as the vendee is seised of the fee in contemplation of equity, although the conveyance be not executed, the same rules ought to be adhered to in each case.

24. Although the estate may, subsequently, to the will, be conveyed, or surrendered, either to the purchaser (*t*), or to a trustee for him (*u*), yet that will not operate as a revocation of his will (*I*).
*The legal estate will of course descend to the heir at law, and he

(*q*) *Per* Sir Wm. Grant, in *Capel v. Girdler*, Rolls, 16 May 1804, MS.; 9 Ves. jun. 509; *Cooke v. Cooke*, 2 Atk. 67.

(*r*) *Capel v. Girdler*, *ubi sup.* See now 8 & 9 Vict. c. 112.

(*s*) *Galton v. Hancock*, 2 Atk. 424, 427, 430.

(*t*) *Parsons v. Freeman*, 3 Atk. 741;

Amb. 116; and see 1 Ves. jun. 256; 2 Ves. jun. 429, 602; 6 Ves. jun. 220; 8 Ves. jun. 127; and *Prideux v. Gibbin*, 2 Cha. Ca. 144.

(*u*) *Jenkinson v. Watts*, Lofft, 609, reported; cited *nom.* *Watts v. Fullarton*, Dougl. 718; *Rose v. Cunyngname*, 11 Ves. jun. 550.

(I) In *Brydges v. Duchess of Chandos*, 2 Ves. jun. 429, Lord Rosslyn, in treating of this point, said, "Another case is supposed to arise, in which this Court determines upon a principle of equity, it is not said directly against the rule of law, but without attending to what the law would be; that is the case where an equitable estate is devised, and after the will the legal estate is taken, the Court has said that does not revoke the will. It is difficult to state that, at this time of day, in a court of law, which could not look at the equitable interest, but looks only at the legal; but as the legal interest is only a shadow, the justice of the case is very evident; but it is a decision in conformity to the like case at law. The very case occurred at law in Roll. Abr. 616, pl. 3. *Cestui que use*, before the statute of uses, devises; afterwards the feoffees made a feoffment of the land to the use of the devisor; and after the statute the devisor dies; the land shall pass by the devise; because, after the feoffment, the devisor had the same use which he had before. That is exactly the case of an equitable estate devised, and a conveyance taken afterwards of the legal estate; and this Court was so far from de-

will in equity be deemed a mere trustee for the devisee, unless *the devisee, thinking the estate did not pass by the will, permit

termining without considering what the rule of law would be, that here is the very point decided by a court of law."

The case referred to is thus stated in Rolle :—" *Si homme aiant feffees a son use devant le statut de 27 H. 8. ust devise le terre al auter, et puis les feffees font feffment del terre al use del devisor et puis le statut le devisor morust, le terre passera per le devise, car apres le feffment le devisor avoit mesme l' use que il avoit devant.*"

The case then appears to be this. The *cestui que use* made his will, and the feoffees afterwards made a feoffment of the lands to his *use*; that is, enfeoffed other persons to the use of him. This appears by the reason given for the decision, namely, "because after the feoffment the devisor had the same use which he had before." Whereas, if the facts of the case were as Lord Rosslyn supposed, the devisor would, before the feoffment, have been a mere *cestui que use*, entitled at law to neither *jus in re*, nor *jus ad rem*; and after the feoffment he would have been actually clothed with the legal seisin of the estate; the case, therefore, seems only a decision, that where a man devises an equitable estate, a transfer of the legal estate to other persons, in trust for him, is not a revocation of his will. And such is still the rule of law (*Doe v. Pott*, Dougl. 2d edit. 710.) as well as of equity, *Jenkinson v. Watt*, Lofft, 609.

It may, however, be objected, that the devisor did not die till after the statute of uses; and therefore admitting the force of the foregoing remarks, it still appears that the legal estate was, by the operation of the act, vested in the devisor. To this it may be answered, that the statute was expressly passed to prevent alienation of estates by devise, although it declared that wills made before the statute, by persons who were or should be dead before the 1st of May 1536, should not be invalidated by the act. We must therefore presume that the devisor died before that time; otherwise the will would have been void by virtue of the act itself, as was expressly decided in a case where *cestui que use* before the statute devised the use; and then came the statute, which transferred the use into possession; and although the testator survived the statute of wills, yet the operation of the statute of uses was holden to be a revocation, *because the use was thereby gone*. 1 Roll. Abr. 616, (R.) pl. 2; *Putbury v. Trevalion*, Dyer, 142, b.—Indeed the statute of uses could not have come in question in the above case, if the feoffment had been made to the devisor himself.

Lord Hardwicke seems to have construed the case in Rolle in the same manner as Lord Rosslyn did, (see *Sparrow v. Harcastle*, 3 Ark. 798; *Ambl.* 224), although he appears to have been struck with the reason given for the decision; in explanation of which, he is in *Atkyns* stated to have said, "The use at law was the beneficial and profitable interest, the same as a trust in equity, and which remained in the same manner after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor." In *Ambler*, his Lordship is reported to have said, "Thus the law considers two interests in the land: the legal estate, and the use; now the use remains the same at the making the devise, and at the death of the devisor; and therefore accepting the grant of the feoffees makes no alteration in it."

Lord Hardwicke's attempt to reconcile what he conceived to be the decision in this case, with the reason given for it, evinces the impossibility of making them consistent. According to his argument, the equitable interest was not merged by its union with the legal estate, but still subsisted in the contemplation of law.

In the case of *Willet v. Sandford*, 1 Ves. 186, Lord Hardwicke classed the different interests in land into three kinds: First, the estate in the land itself; the ancient common-law fee. Secondly, the use; *which was originally a creature of equity*; but since the statute of uses it draws the estate in land to it; so that they are joined, and make one legal estate. Thirdly, the trust; *which the common law takes no notice of*, but which carries the beneficial interests and profits into this court, and is still a creature of equity, as the use was before the statute.

This judicious classification proves (what indeed could not be doubted), that the true principles of this subject were familiar to this great master of equity, and that he was led into a false argument by endeavoring to account for a principle which did not exist.

Upon the point in this note, see further n. (a) to 2 Ves. & Bea. 385; and note (I) to 2 Sugd. Powers, 6.

the heir to take the estate, and acquiesce in this for a long while ; in which case equity will not relieve him (*x*).

25. But in analogy to the decisions upon legal estates (*y*), it has been held, that a devise of a freehold estate contracted for, is revoked by a subsequent conveyance to the usual uses to bar dower (*z*), even where the contract was by parol (*a*), but it is difficult to say, in the latter case, that a conveyance to the usual uses to bar dower is not within the contract of the parties. If, however, it were stipulated in the contract that the estate should be conveyed to the purchaser in fee, or to such uses as he should appoint, a conveyance to uses to bar dower, would not, it is apprehended, operate as a revocation of the will.

26. Estates contracted for *after* the will, will not pass by it (*b*) (1): nor will lands pass by the will, although conveyed to the purchaser subsequent to his will *in pursuance of a contract prior to the will*, unless it was a valid binding contract (*c*) (2).

27. Any codicil executed according to the statute of frauds amounted to a re-publication of a prior will of lands ; and therefore, if a purchaser, previously to a contract, made a *general devise of all his lands*, and after the contract executed a codicil, according to the statute of frauds, unless an intention appeared not to affect it (*d*), the after-purchased estate passed under the devise in the *will (3), although legacies only were given by the codicil, and no notice was taken of the estate (*e*).

(*x*) *Davie v. Beardsham*, 1 Cha. Ca. 39 ; and see *Pigott v. Waller*, 7 Ves. jun. 98.

(*y*) See *Tickner v. Tickner*, 3 Atk. 742, cited ; *Kenyon v. Sutton*, 2 Ves. jun. 600, cited ; and *Nott v. Shirley*, *ibid.* 604, n. ; and see 2 Ves. jun. 429, 600 ; 6 Ves. jun. 219 ; 8 Ves. jun. 115, 211 ; 10 Ves. jun. 249, 256. See also *Luther v. Kidby*, 3 P. Wms. 170, n. ; and observe the distinction.

(*z*) *Rawlins v. Burgis*, 2 Ves. & Bea. 382. There was an appeal to the Lord Chancellor, which was for particular reasons withdrawn. *Buller v. Fletcher*, 1 Kee. 369 ; 2 Sugd. Powers, 6. See *Poole v. Coates*, 2 Dru. & War. 493.

(*a*) *Ward v. Moore*, 4 Madd. 368.

(*b*) *Langford v. Pitt*, 2 P. Wms. 629 ; *Alley v. Alley*, Mose. 262 ; *Potter v. Potter*, 1 Ves. 437 ; and see 1 Atk. 573 ; *White v. White*, 2 Dick. 522 ; Reg. Lib. B. 1775, fol. 650.

(*c*) *Rose v. Cunynghame*, 11 Ves. jun. 50.

(*d*) *Lady Strathmore v. Bowes*, 7 Term Rep. 482 ; 2 Bos. & Pull. 500 ; *Smith v. Dearmer*, 3 You. & Jerv. 278 ; *Monypenny v. Bristow*, 2 Russ. & Myl. 117.

(*e*) *Barnes v. Crowe*, 1 Ves. jun. 486 ; *Pigott v. Waller*, 7 Ves. jun. 98 ; *Goodtitle v. Meredith*, 2 Mau. & Selw. 5 ; *Hulme v. Heygate*, 1 Merr. 285.

(1) *M'Kinnon v. Thompson*, 3 John. Ch. 307.

(2) A will made in Ohio in 1811, by one in possession of real estate under a verbal contract, and for which he afterwards obtained a deed, was held good to pass the legal as well as the equitable title. *Smith v. Jones*, 4 Ohio, 115.

(3) 1 Jarman, Wills (2d Am. ed.) 200 [175] in note (2) ; *Haven v. Foster*, 14 Pick. 541.

28. It was thought that this rule would not apply where the devise in the will was of "the estate of which I am *now seised*;" but the codicil made the will speak as from the date of the codicil (1), and therefore there seemed to be no solid ground for the supposed distinction.

29. And if a purchaser, previously to a contract, by a will duly executed according to the statute, directed his after-purchased lands to be conveyed to the uses of his will and made a provision for his heir at law, and afterwards died without republishing his will, and the after-purchased lands devolved on the heir at law, equity would put the heir to his election, and not permit him to take both the descended estate, and the provision made for him by the will (*f*). But to raise a case of election the words were required to be unequivocal; and therefore a direction to executors to sell whatever real estates the testator might die possessed of, was held not to mean after-purchased estates (*g*). And yet a devise and bequest of all my estate, rent and effects, real and personal, which I shall die possessed of, was decided to have that operation (*h*) (2).

30. In purchasing, therefore, of an heir at law who claims an estate conveyed to his ancestor after the date of his will, when that will was executed before the 1st January 1838, and not revived or republished since that day, the purchaser should be satisfied of three points; viz. 1st, That the contract was not entered into by the testator previously to making his will. 2dly, That no codicil was afterwards executed by him, according to the statute of frauds, by which the lands, although not in contemplation, passed. And, 3dly, If the will affects to pass all the estates which the vendor might thereafter acquire, that the heir at law does not take any interest under the will; and these observations of course apply to titles depending upon purchases made under those circumstances from heirs at law, although completed by conveyance.

31. As to copyholds,—by the old law, if a man made a disposition by will of all his copyhold estates generally, and afterwards

(*f*) *Thellusson v. Woodford*, MS. 13 Ves. jun. 209, affirmed in Dom. Proc.; and see Sugden on Powers, ch. 10, section 5.

(*g*) *Back v. Kett*, 1 Jac. 534; *Johnson v. Telford*, 1 Russ. & Myl. 244.

(*h*) *Churchman v. Ireland*, 4 Sim. 520; 1 Russ. & Myl. 250.

(1) 1 Jarman, Wills (2d Am. ed.) 200 et seq. and notes, 290.

(2) See 1 Jarman, Wills (2d Am. ed.) Chap. XV. p. 373 et seq. and notes, where this subject of election is fully discussed, and see *Noys v. Mordaunt*, & *Streathfield v. Streathfield*, in *White's Leading Cas. in Equity* (Am. ed.) [223] et seq. and notes.

purchased other copyhold estates, and surrendered them to the uses *declared by his will (*i*), or even to the uses declared by his will *of and concerning the same* (*k*), the after-purchased estates would pass under the general devise, although the will was not republished. Therefore, where a copyhold estate has been surrendered to the use of a will, and the purchaser is buying of the heir at law, who claims in the absence of any devise subsequently to the purchase by his ancestor (the case not falling within the late act), he must be satisfied that the estate did not pass under any general devise in a will prior to the purchase.

The act for rendering a surrender to a will unnecessary (*l*), rendered it unlikely that this point should again arise, and now the doctrine is wholly confined to wills or codicils made before the 1st January 1838, for by the late statute, whatever copyholds a man may have at his death, whether there is a custom to devise them or not, and whether he has been admitted or not, and of course, therefore, although not surrendered to the will, will pass by it (*m*).

32. From the time of the contract, the purchaser, and not the vendor, being owner of the estate in equity, it followed that if a man devised his estate, and afterwards contracted for the sale of it, the devise would thereby be revoked *in equity* (*n*) (1).

33. And even where an estate was by a will directed to be sold, and the money to be paid to certain persons, and the testator himself afterwards sold the estate, it was held, that the legatees were not entitled to the money produced by the sale (*o*), and it was immaterial that the contracts were abandoned by the purchasers because they could not obtain a conveyance from the devisees, who were infants (*I*), for although the contracts were properly abandoned, yet the will was revoked (*p*) (2).

34. If, however, an agreement were such as a court of equity would not carry into execution against the representatives, there

(*i*) *Heylyn v. Heylyn*, Cowp. 130; Lofft, 604. This point has since been so decided at *nisi prius*.

(*k*) *Attorney-general v. Vigor*, 8 Ves. jun. 256. See *Smart v. Prujean*, 6 Ves. jun. 565; and the last ed. of Gilbert on Uses, n. (5), p. 72.

(*l*) 55 Geo. 3, c. 192.

(*m*) *Infra*.

(*n*) *Ryder v. Wager, and Cotter v. Lyster*, 2 P. Wms. 332, 623; and see 2 Ves. jun. 436; *Vawser v. Jeffrey*, 16 Ves. jun. 519; 3 Russ. 479.

(*o*) *Arnald v. Arnald*, 1 Bro. C. C. 401; 2 Dick. 645. *Kenbold v. Road-knight*, 1 Russ. & Myl. 677; 1 Toml. 492.

(*p*) *Tebbot v. Vowles*, 6 Sim. 40.

(I) But now see 1 Will. 4, c. 60.

(1) 1 Jarman, Wills (2d Am. ed.) 177, 178.

(2) 1 Jarman, Wills (2d Am. ed.) 180, to 182.

seemed ground to contend that it would not revoke the will, because the agreement could operate as a revocation in equity only; and therefore, if equity would not sustain the agreement in respect of which the will was held to be revoked, there appeared *to be no solid reason why the devise of the estate should not take effect. In *Onions v. Tyrer* (q), the Lord Chancellor held, that a second will, devising lands to the same person as the former, and revoking all former wills, but not duly executed, should never revoke the former will so as to let in the heir (1); *nay, if by the latter will the premises in question had been given to a third person, it should never have let in the heir, in regard the meaning of the second will was to give the second devisee what it had taken from the first, without any consideration had to the heir; and if the second devisee took nothing, the first would have lost nothing.*

35. These principles ought, perhaps, to be referred to the words of the statute of frauds (r); but still as an agreement was only an equitable revocation, the same reasoning applied to the case before us. Where a man contracts for the sale of his estate, he intends to increase his personal estate, and not to benefit his heir; and if the Court will not carry the agreement into a specific execution for the benefit of the personal estate, "the personal estate takes nothing, and the devisee can have lost nothing."

36. In the two cases (s) in which it has been holden, that an agreement will revoke a will in equity, it makes a term of the proposition, that the agreement amount in equity to a conveyance. And it should seem that Lord Eldon was of this opinion, for in *Knollys v. Alcock* (t), where it was contended that an agreement in equity is a revocation only where it can be performed, he did not deny the rule as stated, but showed, that the agreement in that case was such as equity would perform (u), (I); and in *Clynn v. Littler* (x), Lord Mansfield laid it down, that covenants had

(q) 1 P. Wms. 345. See 7 Ves. jun. 379.

(r) See Pow. Dev. 641.

(s) *Ryder v. Wager*, and *Cotter v. Lay-er*, *ubi sup.*

(t) 7 Ves. jun. 558. There was an appeal from the decision in this case,

which was compromised; and see *Mayor v. Gowland*, 2 Dick. 563. See also 2 Ves. jun. 436.

(u) See *Savage v. Taylor*, Cases T. Talb. 234.

(x) 1 Blackst. 345.

(I) It appears by an abstract of the title to the estate, in respect of which the litigation in *Savage v. Taylor* was commenced, that the heir at law of the testator in his answer to the bill of the devisee, insisted, that if the will was originally valid, yet it was revoked by the articles for sale, although the Court ought not to carry them into execution.

(1) See 1 Jarman, Wills (2d Am. ed.) 183 et seq. and notes.

never been allowed to be revocations, *unless where the covenantee has a right to a specific performance.*

37. Whether an *abandonment* of an agreement would prevent the contract from operating as a revocation of a prior will, seems to be a more doubtful point. In the case of *Knollys v. Alcock*, before referred to, it was also contended, that an agreement which ^{*}was abandoned was not a revocation in equity; but Lord Eldon said, he did not admit, that if there is an agreement in equity, which at the moment is a completely operative revocation, a subsequent abandonment will of necessity set up the will. He added, that he did not say whether it would be so or not, for he was of opinion he could not raise the question in the case before him, as the agreement was never abandoned. Sir Wm. Grant upon the same point said, that he very much doubted whether the abandonment of the contract in the testator's lifetime would set up the will without a republication. But where the will was revoked *at the testator's death* by the contract, of course no subsequent event could render the will operative and effectual (*y*). In the first case in the books (*z*), in which the question arose whether a covenant to convey an estate devised should operate at law as a revocation of the will, it was holden that such a covenant without more, was not any revocation of the will; because perhaps the devisor's intention would alter before performance of the covenant. At law, therefore, a contract does not revoke the will; but a conveyance in pursuance of the contract would of course operate as a revocation, or to speak more technically, as an *ademption*. Now it may be contended, that the same rule must prevail in equity, and that a contract for sale ought not to affect the validity of a prior will, until it is carried into execution, or, which in equity is tantamount to a conveyance, until the Court decree a specific performance of it. While an agreement rests *in fieri*, and the validity of it has not been acknowledged by a decree, it seems equitable that the owner should be at liberty, with the concurrence of the other party, to alter his mind. Indeed in the absence of intention there seems to be no weighty distinction between an agreement which has been abandoned, and an agreement which equity will not perform. If a man make a second will without expressly revoking the first, and afterwards cancel the second will, the first is revived,

(*y*) *Bennett v. Lord Tankerville*, 19 Ves. jun. 170.

(*z*) *Montague v. Jefferies*, 1 Ro. Abr. 615 (P.), pl. 3.

the second will being considered only intentional (*a*) (1); and although it is true that a will is ambulatory till the death of the testator, yet the same ground may be taken in support of a will impliedly revoked by an agreement afterwards abandoned. Why should not a mere agreement be deemed ambulatory till it is completed, when it is clear that the parties may rescind the agreement, and the estate of the devisor is not altered so as to effect a revocation at law?

*38. The seller after the contract and before the conveyance was not considered so absolutely a trustee as to prevent the estate from passing by a devise by him, subsequently to the contract, of his real estate to trustees to sell (*b*). But where an estate under contract was devised expressly by name, it was held that the legal estate only passed to enable the devisee to carry the contract into execution, and that the devisee was not entitled to the purchase-money beneficially (*c*). The principle of this decision will necessarily furnish many exceptions to the rule laid down in the case of *Wall v. Bright* (2).

39. When an estate is contracted to be sold, it is in equity considered as converted into personalty from the time of the contract (1): and this notional conversion takes place, although the election to purchase rests merely with the purchaser (*d*) (3).

40. Thus in a case before Lord Kenyon, at the Rolls (*e*), Whitmore demised to Douglas for seven years, with a covenant, that if the tenant after the 29th of September 1761, and before the 29th of September 1765, should choose to purchase the inheritance for 3,000*l.*, Whitmore would convey to him. In 1761, before any

(*a*) *Goodright v. Glazier*, 4 Burr. 2512. terms of the devise.

(*b*) *Wall v. Bright*, 1 Jac. & Walk. 490.

(*c*) *Knollys v. Shepherd*, 1 Jac. & Walk. 499, cited. This case was affirmed in 1825 in Dom. Proc. MS. The decision depended upon the particular

(*d*) *Lawes v. Bennett*, 7 Ves. jun. 436; 14 Ves. jun. 596, cited; 1 Cox, 167, reported; S. C. cited, 16 Ves. 253, 254, *nom.* *Douglas v. Whitrong*; *Ripley v. Waterworth*, 7 Ves. jun. 425. *In re Crofton*, 1 Ir. Eq. Rep. 204.

(*e*) Whitmore's case *ubi sup.*

(1) The decision in the case of *Foley v. Percival*, 4 Bro. C. C. 419, seems to depend on the personal estate having been charged with the legacies; and the *dictum* of the Lord Chancellor, that an estate contracted to be sold, is not converted into personalty, where it will disappoint the testator's intention as to the payment of legacies charged upon the estate by his will, appears not to be warranted by either principle or authority. The case of *Comer v. Warkley*, 2 Dick. 649, is misreported. See *post*, ch. 9.

(1) 1 Jarman, Wills (2d Am. ed.) 188.

(2) 1 Jarman, Wills (2d Am. ed.) 561, 562.

(3) See *Craig v. Leslie*, 3 Wheaton, 563, 577; *Postell v. Postell*, 1 Desaus. 173.

election, Whitmore died, and left all his real estate to Bennett in fee, and all his personal estate to Bennett and his sister equally. In 1765, before the time mentioned, Waller, who purchased the lease and benefit of the agreement from Douglas, called on Bennett to convey for 3,000*l.*; which conveyance was made in consideration of that sum. Afterwards the sister and her husband filed a bill against the representative of Bennett, claiming a moiety of the 3,000*l.* and interest, and it was decreed accordingly.

This decision was followed by Lord Eldon, in a case (*f*) where the estate had not been devised. He observed, that he did not mean to say that a great deal might not be urged against it, but *where there was a decision precisely in point it was better to follow it. There appears to have been no difficulty in the case before Lord Eldon, where the contest was between the heir at law and the personal representative only. It would have been difficult to extend the rule to a devise of the estate by name, although every devise of real estate is in its nature specific. In deciding in favor of the conversion in *Lawes v. Bennett*, Lord Kenyon observed, that no stress could be laid upon the will of the testator, for that was expressed in very general terms. He had two species of property, one of which he gave to Bennett, the other to Bennett and his sister. Then which kind of property was the present? A contract to sell an estate made it personal property, and he thought it made no distinction that it was left to the election of the tenant whether it should be real or personal (*g*).

41. It has lately been decided, that a devise of the very lands by description does not fall within the rule in *Lawes v. Bennett*, but the purchase money will belong to the devisee (*h*).

42. In these cases, until the option is declared, the rents belong to the heir or devisee. And where in a common contract, to be completed by a future fixed day, "but all rent and other profits to accrue in the meantime," were to belong to the vendor, his heirs, executors, and administrators, and the vendor died before the day, it was held, that the intermediate rents belonged to the heir, as the words showed an intention that the estate should be kept as realty up to the time when it was to be converted absolutely into personal estate (*i*).

43. Upon the same principle it has been determined, that if a

(*f*) *Townley v. Bedwell*, 14 Ves. jun. 591.

(*g*) 1 Cox, 171.

(*h*) *Drant v. Vause*, 1 You. & Coll. C. 580.

(*i*) *Shadforth v. Temple*, 10 Sim. 184.

man having a timber estate, agree to sell a given quantity per annum, to be chosen by the buyer, although the owner die, and the option is in the buyer, yet the timber cut after the owner's death, however large in quantity, will be part of his personal estate (*k*).

44. The rule established by these decisions must frequently subvert the vendor's intention; where, therefore, a vendor intends the estate, as between his real and personal representatives, to be deemed real estate, a declaration to that effect should be inserted in the agreement for sale.

45. We may here observe, that equity will not only enforce a contract to sell, although the election is in the other party alone, as in the cases above quoted, but would execute a will proposing *a right of pre-emption (I). If an estate is stated in a will to have been valued at 50,000*l.*, and it is directed to be offered to a particular person at 30,000*l.*, clearly the Court would act. In the more difficult case, where a testator directs trustees to offer the estate at such price and upon such terms as they may think proper to fix, the Court will, if the trustees will not act, place itself in their stead, and refer it to the Master to fix a price. Again, if the testator ordered the trustees to put a reasonable value upon the estate and to offer it to a particular person at that value, and they die or refuse to act, the Court might direct a reference to the Master to fix the value and execute the trust by proposing the estate to him at that value, and if he did not accept the proposal, putting it up by public sale (II). Neither the nature of the property nor the difficulty of executing the trust ought to alter the rule. Such a will amounts in substance to a devise of the estate itself, if the favored object elect to take it. But he must in his lifetime or by his will do some act, denoting that he accepts the

(*k*) See 7 Ves. jun. 437; 1 Cox, 171.

(I) As to a right of pre-emption of timber which a lessee is authorized to cut down, see *Goodtitle v. Saville*, 15 East, 87; and as to such a right in a real estate belonging to a partnership, see *Cookson v. Cookson*, 8 Sim. 529; and as to enlarging the time by conduct, see *Pyke v. Northwood*, 1 Bea. 152. A claim for *re-purchase* must be literally pursued, *Joy v. Birch*, 4 Clar. & Fin. 89. As to a right in a public body to purchase under an Act of Parliament, as a railway company, see *Webb v. Manchester and Leeds Railway Company*, 4 Myl. & Cra. 116; *Stone v. Commercial Railway Company*, *ib.* 122. A right of pre-emption in a tenant is at an end where the tenant's interest in a part of the land is bought by the lessor, *Sparrow v. Cooper*, 1 Hay. & Jo. 404.

(II) This latter would be with a view to a *general* sale: it could hardly be another mode of leaving the favored object to work out his right by buying at the auction.

benefit, or the Court cannot consider him as the purchaser of the estate (l).

46. But the purchase must in substance be concluded within the prescribed time, as far as depends upon the purchaser, and therefore, where a devise to trustees was in trust, to permit the testator's son at any time within three months to become the purchaser at a certain price, and to convey the same to him in fee, but should he not complete the purchase within the three months, to sell the same generally, a verbal intimation by the son of his intention to purchase, assented to by them, but not followed by payment of the money, and the title-deeds were not delivered to the solicitor to the trustees with instructions to prepare the conveyance until the last day of the three months, was held not to give the son the right to enforce the sale to him, for the son ought at the least to have placed the purchase-money under the control of the *trustees: a mere verbal notification of an intention to purchase could not be said to be a completion of the purchase (m).

47. Where the contract is binding at the death of the vendor although the purchaser by subsequent laches lose his right to a specific performance, yet the estate will belong to the next of kin and not to the heir at law (n).

48. We may further observe, that if a lease be granted, with power to the lessee to cut and sell the timber, and the lessee is required *when and so often* as he intends to sell the timber, or any part thereof, to give notice to the lessor to whom the pre-emption was given; the lessee having a *bona fide* intention to cut down all the timber, may give a general notice to the lessor, and if the lessor decline to purchase the timber, the lessee may cut it down at intervals and need not repeat the notice (o).

49. But to return to the cases of devises before or after contracts, secondly, we are to consider the law as it applies to wills executed upon or subsequently to the 1st January, 1838. Every such will speaks and takes effect with reference to the property comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention appear (p) (1).

(l) *The Earl of Radnor v. Shafto*, 11 Ves. jun. 454, 455, *per* Lord Eldon.

(m) *Dawson v. Dawson*, 8 Sim. 346.

(n) *Curre v. Bowyer*, 5 Beav. 6, n.

(o) *Goodtitle v. Saville*, 16 East, 87; see *Doe v. Abel*, 2 Mau. & Selw. 541.

(p) 1 Vict. c. 26, s. 24; *vide infra*, ch. 11, s. 3.

(1) In most of the United States, it has been provided by statutes, that after-acquired land shall pass by the will, if such was the intent of the testator. In

And it passes all property, legal as well as equitable, and contingent as well as vested interests, even a hope of succession, if it be realised in the testator's lifetime, and also rights of entry, and copyholds as well as freeholds, and whether there is any custom to devise them or not, and although the deviser shall not have surrendered the same to the use of his will, or not have been admitted. And of course all such estates, rights and interests pass, although the testator became entitled to them subsequently to the execution of his will (*q*) (*1*).

50. And no conveyance or other act done subsequently to the execution of a will relating to any estate comprised in it (except an act of revocation by a subsequent marriage (*r*), or by another regular will or codicil, or by destroying the will,) (*s*), will prevent the operation of the will with respect to such estate or interest as the testator has power to dispose of by will at the time of his death (*t*) ; in short, the will speaks, as we have already observed, *as to the property, as if it had been executed immediately before the testator's death (*u*).

51. The operation of the Act is to confirm the right to devise an estate acquired by contract, whether the estate be copyhold or freehold.

52. But words of actual description, like the cases of *Atcherley v. Vernon* and *St John v. Bishop of Winton*, must still be decided according to the intention. The power to devise in such cases is unquestionable : the intention to do so is to be collected from the terms of the devise (*x*).

53. The law is still the same as to a devise by a man who has *contracted* for the inheritance having already a term of years. The equitable fee would pass, and the term would attend it (*y*).

54. Whether, if such a purchaser had, previously to the purchase, made his will under the new law, by a general bequest in which the term would have passed, the legatee will be entitled to

(*q*) Sect. 3.

(*r*) Sect. 19.

(*s*) Sect. 20.

(*t*) Sect. 23.

(*u*) Sect. 24.

(*x*) *Supra*, p. 195.

(*y*) *Supra*, p. 196. See 8 & 9 Vict. c. 112.

some of the States this intent must appear on the face of the will. In others it is inferred from a general devise of all the testator's estate, or unless a contrary intention appears. 3 Cruise, Dig. by Mr. Greenleaf, vol. 6, Tit. 38, Devise. Ch. 3 §32 in note ; 1 Jarman, Wills (2d Am. ed.) 85 to 87 [43 to 45,] in notes ; 289 et seq. [277] 301, 302, [293, 294] in note ; *Cushing v. Aylwin*, 12 Metcalf, 169 ; post, 563, in note.

(1) 1 Jarman, Wills (2d Am. ed.) 85, 86, and notes.

it, although the bequest be not expressly revoked, is a point of some nicety (z). The rule of equity, that the term attends the inheritance immediately on the purchase of the fee, still remains; but it must bend to the provisions of the Legislature. Now the statute provides that no act done subsequently to the execution of a will of real or personal estate (except a revocation within the terms of the Act, which the purchase of the inheritance would not amount to,) shall prevent the operation of the will with respect to such interest as the testator shall have power to dispose of by will at the time of his death (a); and that every will shall be construed with reference to the estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear *by the will* (b).

55. Now the rule of equity which denied to the legatee the right to the term, proceeded upon the rule that the term became attendant upon the inheritance, and no longer remained in the view of equity as a term in gross. But the statute, with few exceptions, prevents any act subsequently to the will from operating as an implied revocation of the gift of the estate which the testator has at his death; and although the case we are now considering was not in the view of the Legislature, yet the statute *seems* to save the bequest to the legatee for the term of years, because, notwithstanding the subsequent act, viz., the purchase of the inheritance, *the will is still to operate with respect to the testator's interest at his death as far as that is disposed of by the will. But it may be urged that there is no specific gift of the estate, even for the years in the case supposed, and that it would probably be contrary to the intention of the testator that the term, after he has purchased the inheritance, should pass as part of his personal estate. The reply is, that by the statute the question must be, Does a contrary intention appear *by the will*? Now, *the will* only shows an intention to pass all the personal estate, of which this was a part, and at law still is. It may be urged, that by the statute the will is to be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will; and therefore that this will must be so construed as no contrary intention appears by it, and consequently it cannot pass the term of years, because, if a lessee for years, having contracted for the inheritance, were to

(z) *Supra*, p. 196.

(a) Sect. 23.

(b) Sect. 24.

make his will and simply bequeath his personal estate, the term of years would not in equity pass to the legatee. But it may be thought that the clause in question was intended to enlarge and not to restrict the testator's power, and that the case altogether depends upon the previous section. The term was bequeathed by the will as it stood, and the subsequent act is not to defeat its operation.

56. But a still more difficult case may arise. A lessee for years may make his will and give all his personal estate to *A*, and all his real estate to *B*, and afterwards contract for the fee, and then die without republishing his will. At the time he made his will it would have passed the lease to *A*, at the time of his death it will pass the fee to *B*. Is the legatee still entitled to the term? It would, perhaps, be held, that he is not, because it may be said the character of the estate has changed in equity, and as the will by the statute will operate upon the whole fee, no provision of the Act would be contravened, and the will would speak and take effect as to the estate, as if it had been executed immediately before the death of the testator; for *such* a will, executed under such circumstances, immediately before the testator's death, would of course pass the fee to *B*, and the term would attend it. But this is not a clear point, and it might be considered more consistent with the statute to allow the term to pass to the legatee, and the fee (subject to the term) to the devisee.

57. But let us suppose that, in the case originally put, there was, after the contract, a conveyance of the fee to the purchaser, or the term was assigned to attend the inheritance, in either case *it seems that the legatee would not take the term; for, in the first case, the term would have merged by its union with the fee, and no interest in the nature of personal estate would have remained to be acted upon by the will; in the latter case, there would be a new destination of the term; it would no longer be personal estate of the testator, either at law or in equity; but at law would belong to the trustee, and in equity would be attached to the inheritance.

58. If the term had been *specifically* bequeathed, the rule before the statute would, we have seen, have been the same (c). But that circumstance now would make a difference: not, however, in the cases last supposed; for an actual conveyance of the fee to the testator merging the term, or an assignment of the term to

attend, would have the same operation, whether the term had been specifically bequeathed, or would have passed under a general bequest.

59. But where the term is specifically bequeathed, a *contract* for the fee would not now, it is conceived, defeat the bequest; and if there were a specific bequest of the term to *A*, and a general devise of real estate to *B*, although the latter would pass the fee to *B*, by force of the statute, notwithstanding that there was no republication after the contract, yet the bequest of the term would, it seems, remain valid, for the thing itself would still subsist, and the testator, at his death, had power to dispose of it; and a similar gift in a will executed immediately before the testator's death, would have the same operation; and in this case no contrary intention would appear *by the will*. Indeed, it will perhaps be contended in such a case that the legatee of the term takes the fee; because the estate is given by the will, and the statute supplies words of inheritance (*d*), and makes the will speak as if executed immediately before the death; but this could not be maintained, because in such a case the term is given to the legatee, which prevents the operation of the clause in the statute vesting the fee, and a contrary intention would appear on the face of the will.

60. In considering these questions upon the right of a legatee to a term of years where the termor, the testator, has contracted for the fee subsequently to the will, it will now be necessary to consider also the operation of the 8 & 9 Vict. c. 112, for rendering the assignment of *satisfied* terms unnecessary: the operation of which act is in terms confined to *satisfied* terms by express *declaration, or by construction of law attendant upon the inheritance.

61. The statute of 1 Vict. c. 26, altogether alters the law as to revocation by the mode of conveyance in pursuance of a contract; if there are sufficient words to pass the estate in the will, although made before the contract, no possible form of conveyance giving to the purchaser the beneficial interest in the estate can prevent it from passing by the will: it is unimportant, therefore, that the estate is conveyed to uses to bar dower; for whatever interest the testator has in the estate at his death, will pass by the will whenever executed. And questions cannot arise upon the new act in regard to putting an heir to his election, where the testator assumes to

devise his after-purchased estates (*e*), for they will actually pass, even under a general gift, and the heir at law will have no title.

62. In purchasing, therefore, from an heir at law, whose ancestor survived the 31st of December 1837, whether there was a contract or not, it must be ascertained that he did not execute at any time after that date any will or codicil in the presence of two witnesses, and attested by them and signed by them in his presence and in the presence of each other (*f*) ; for if he did by such a will devise his real estate, it is not likely that the heir at law has any right, for not only are words of inheritance now supplied, but lapsed devises of real estates fall into the residue, and the will, whenever executed, passes the property which the testator has at his death.

63. As to dispositions by *vendors*, under the old law, a contract by a man to sell his estate revokes his will in equity, although not at law (*g*), and the rule has been held not to be varied by the statute (*h*).

64. If an agreement be such as a court of equity will not carry into execution, it is clear that the property will by the new law pass to the devisee, whatever might have been the true rule before (*i*).

65. So of course where the contract is abandoned, the devise will not now be affected (*k*), because, notwithstanding the act done, the will still operates on all the interest which the testator had power to dispose of by will at the time of his death, and speaks as to the property as at that time.

66. The leading object of the act being to pass to the devisee whatever devisable interest the testator had in the estate at the *time of his death, notwithstanding any act done by the testator subsequently to the will, other than a revocation by another will or by marriage, it would now seem that a devise to a man of an estate contracted by the devisor to be sold would require stronger words than those used in *Knollys v. Shepherd*, to make the devisee a mere trustee instead of taking beneficially (*l*).

67. The law does not appear to be altered in such cases as *Lawes v. Bennett* (*m*), for there the will operates according to the intention at the testator's death, and its operation is afterwards changed

(*e*) *Supra*, p. 199.

(*f*) See II. Sugd. Wills.

(*g*) *Supra*, p. 200.

(*h*) *Farrar v. Lord Winterton*, 5 Beav.

1; *Moor v. Raisbeck*, 12 Sim. 123. See

II. Sugd. Wills, 53; 3 Dru. & War. 99.

(*i*) *Supra*, p. 200.

(*k*) *Supra*, p. 201.

(*l*) *Supra*, p. 203.

(*m*) *Supra*, p. 203.

by the subsequent conversion of the property, with which operation, or its effect upon the will, the statute does not seem to interfere.

68. But, in conclusion, we may observe, in the words of another writer (*n*) that the act goes much further than simply to leave the will to operate on such interest as the testator *has left in him* by the effect of a conveyance subsequently to his will, for the will is to operate upon such estate or interest as the testator has power to dispose of by will *at the time of his death*. If, therefore, a man were to make his will disposing of his real estate, and afterwards were to convey the whole fee to uses or upon trusts, relimiting or leaving any interest in himself, that interest will pass by his will; but still further, if he were afterwards to convey to a purchaser his remaining interest in the estate, and at a subsequent period to re-purchase the property, and die seised of it, it would pass by his will to the devisee.

69. In a case like that of *Arnald v. Arnald*, where the testator devises his estate to trustees to sell, and pay the money to certain legatees, and afterwards sells the estate himself, this will still, as under the old law, be an ademption (*o*).

70. If a legacy be given as demonstrative one, to be paid out of the proceeds of the sale of an estate for which the testator has contracted, it will be payable out of the general assets if the contract be rescinded (*p*).

71. In regard to cases common to the old and the new law, where an estate contracted for after the will does not pass by it, the heir at law will be entitled to have the estate purchased for his own benefit, out of the personal estate of his ancestor (*q*), and that, although he unite in himself the three characters of vendor, heir, *and executor (*r*). The estate will, however, be assets in the hands of the heir.

72. So if the purchaser die intestate, the heir will in like manner be entitled to have the estate purchased for him: and if his ancestor die before the conveyance is executed, the heir may devise, charge, or sell the estate, in the same manner as the ancestor himself might have done (*s*), and it will now be subject to the power of the purchaser's widow, unless he has deprived her of that right (*t*).

(*n*) H. Sugd. Wills, 52.

(*o*) *Moor v. Raisbeck*, 12 Sim. 123.

(*p*) *Fowler v. Willoughby*, 2 Sim. & Stu. 354; *qu.* When was the contract rescinded? *Newbold v. Roadknight*, 1 Russ. & Myl. 677.

(*q*) *Milner v. Mills*, Mose, 123: and

see 2 P. Wms. 632; 3 P. Wms. 224; *Broome v. Monck*, 10 Ves. jun. 597.

(*r*) *Coppin v. Coppin*, Sel. Cha. Ca. 28; 2 P. Wms. 291.

(*s*) *Langford v. Pitt*, 2 P. Wms. 629.

(*t*) 3 & 4 Will. 4, c. 105, s. 2, and *post*, ch. 11, s. 2.

73. If the executor complete the purchase, and take the conveyance in his own name, he will be a trustee for the heir or devisee (*u*). And if the assets cannot be got in, and the real representative pay for the land out of his own pocket, he may afterwards call upon the personal estate to reimburse him (*x*). So, if the personal estate is insufficient to perform the contract, and the agreement is on that account rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty as far as it extends. And it has been decided, that if by reason of the complication of the testator's affairs, the purchase-money cannot be immediately paid, and the vendor for that reason rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase-money in the purchase of other estate for his benefit (*y*).

74. But if the heir not being entitled to have the estate paid for out of the personal estate, actually obtain and apply the personal estate in payment of the purchase-money; the persons entitled to the personal estate will not be entitled to the lands, but only to a charge on it for the amount of the money wrongly applied (*z*).

75. But—to return to the point under consideration—if upon the death of the vendor a title cannot be made, or there was not a perfect contract, or the Court should think the contract ought not to be executed, in all these cases there is no conversion of real estate into personal in consideration of the Court, upon which the right of the executor on the one hand, and of the heir or devisee on the other, depends; and therefore the estate will go to the heir at law of the vendor, in the same manner as if no contract had been *entered into (*a*). So if upon the death of the purchaser a title cannot be made, or there was not a perfect contract, his heir or devisee will not be entitled to the money agreed to be paid for the lands, or to have any other estate bought for him (*b*). For although the purchaser himself, if alive, might elect to take the estate with the bad title (*c*), or where there is an outstanding interest with a compensation (*d*); yet where he is dead the Court cannot speculate

(*u*) *Alley v. Alley*, Mose. 262.

(*x*) See 10 Ves. jun. 614, 615.

(*y*) *Whittaker v. Whittaker*, 4 Bro. C. C. 31; *Broome v. Monck*, 10 Ves. jun. 597. Vide *infra*.

(*z*) *Savage v. Carroll*, 1 Ball & Beatty, 265. See *post*, ch. 20.

(*a*) *Lacon v. Mertins*, 3 Atk. 1; *Attorney-General v. Day*, 1 Ves. 218; *Buckmaster v. Harpor*, 7 Ves. Jun. 341;

and see 8 Ves. jun. 274; *Rose v. Cunnynghame*, 11 Ves. jun. 550.

(*b*) *Green v. Smith*, 1 Atk. 573; *Broome v. Monck*, 10 Ves. jun. 597; *Savage v. Carroll*, 1 Ball & Beatty, 265. Vide *supra*.

(*c*) *Western v. Russell*, 3 Ves. & Bea. 187.

(*d*) *Collier v. Jenkins*, Yo. 295.

upon what he would or would not have done ; but, in these cases, the enquiry must be, whether at his death a contract existed, by which he was bound, and which he would be compelled to perform. That alone can give the heir of the purchaser a right to call for the personal estate to be applied, or to the personal representative of the vendor, a right to call upon his heir. The question must be the same, whether a purchase or a sale is insisted on. Was the ancestor himself bound ? Was there such an agreement as converts the real estate into personal, or the personal estate into real ? (e) (I). On this ground it has been decided, that where a man had a right of pre-emption of an estate under a will, and did not accept the offer in his life-time, or denote any intention by his will to do so, there was no subsisting contract, by virtue of which the right passed to the real representative, so as to enable him to call upon the personal estate to pay for the estate, as if it had been contracted for (f). So where upon a parol treaty, the purchaser filed his bill for a specific performance of it, and the vendor submitting to perform it, a decree was made, that the purchaser should pay the money into the bank by a given day, or the bill should be dismissed ; and the purchaser paid the money according to the decree : in a question between his heir and devisee it was determined, *that the estate did not pass by a general devise in his will, which was made *prior* to the payment of the money (g). It will be observed, that in this case, neither of the parties was bound at the time the bill was filed ; and if the purchaser had not paid the money, his bill would have been dismissed, and, in that event, no contract would ever have existed. It was therefore clear, that the inception of the contract was upon payment of the money, and the will, therefore, having been made *before* the contract, could not affect the estate. But now such a will would operate to pass the estate contracted for, although the contract was concluded *after* the execution of the will (h).

(e) *Per* Sir Wm. Grant, 7 Ves. jun. 344, 345.

(f) *Earl of Radnor v. Shafto*, 11 Ves. jun. 448.

(g) *Gaskart v. Lord Lowther*, 12 Ves. jun. 107 ; and see *Duckle v. Baines*, 8 Sim. 525.

(h) 1 Vic. c. 26. *Vide supra*.

(I) Note, in *Potter v. Potter*, 1 Ves. 438, a bill was filed to compel execution of the parol agreement in the testator's lifetime ; his agent gave a note for payment of part of the purchase-money, and *let the estate as he pleased*. Possession of the estate must, therefore, have been delivered to him. And the Master of the Rolls expressly said, that the agreement was so far carried into execution, even before the will, as to supply the want of writing. This case, therefore, like the others, only proves, that a *binding* contract in the testator's life-time will be enforced.

76. But if an estate directed to be bought, but not actually contracted for, is not, or cannot be bought, yet the money must be laid out in other lands, for the benefit of the devisee (*i*). And where a testator intends that the devisee of the contracted estate shall have another estate of equal value, in case a good title cannot be made to the one contracted for, an express declaration to that effect should be inserted in the will.

77. By this time we must have observed, that the foregoing rules, as to the conversion of the estate, apply to those cases only where a court of equity will decree a specific performance: for if equity will not interfere, and the vendee be left to his remedy at law, the rules of law, and not those of equity, must then prevail, and consequently neither the vendor nor his heir would be considered as a trustee for the purchaser, but would only be subject to an action for breach of contract.

(*i*) *Whittaker v. Whittaker*, 4 Bro. C. Monck, 10 Ves. jun. 597. *Vide supra*. C. 31; and see 2 Atk. 369; *Broome v.*

*SECTION II.

OF OTHER RIGHTS AND LIABILITIES ARISING OUT OF CONTRACTS.

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| <p>2. <i>Where purchaser liable to existing mortgage debt.</i></p> <p>4. <i>Stopping proceedings in ejectment.</i></p> <p>5. <i>Further advances to mortgagor after a sale by him.</i></p> <p>6. <i>Redemption of mortgages on distinct estates.</i></p> <p>7. <i>Loss of mortgage deed.</i></p> <p>8. <i>Production of mortgage deed.</i></p> <p>9. <i>Assignee of mortgagee subject to the account.</i></p> <p>11. <i>Annuity the price of an estate, how to be secured.</i></p> <p>12. <i>Purchaser to indemnify against charges.</i></p> <p>13. <i>As where he buys a lease.</i></p> <p>14. <i>Or an equity of redemption.</i></p> <p>15. <i>Remedy of surety against purchaser.</i></p> <p>16. <i>Liability of sub-purchaser.</i></p> | <p>17. <i>Agreement to give real security enforced.</i></p> <p>19. <i>Purchaser's remedy for rent and covenants.</i></p> <p>20. <i>Apportionment of rents.</i></p> <p>21. <i>Liquidated damages.</i></p> <p>22. <i>Purchaser of legacy entitled to stock investment.</i></p> <p>23. <i>Fraud in sale of life policy.</i></p> <p>24. <i>Where power to re-purchase makes a loan.</i></p> <p>25. <i>Payment to be made on condition.</i></p> <p>26. <i>Re-purchase on a condition.</i></p> <p>27. <i>Notice to purchase binding under Act of Parliament.</i></p> <p>28. <i>Railway Act; costs of making out title.</i></p> <p>29. <i>Purchaser bound by grant of stewardship for life.</i></p> <p>30. <i>Steward of manor.</i></p> |
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1. WE have already considered the operation of a contract

upon an existing tenancy, and we shall, in considering the remedy at law upon a contract, have occasion to show that the giving of possession to purchaser before the conveyance does not create a tenancy (a).

2. Disputes often arise between the real and personal representatives, where a person purchases an equity of redemption; the real representative mostly claiming to have the mortgage money paid off out of the personal estate, and the personal representative resisting the demand. Unless the mortgage money form part of the consideration money for the estate, or the purchaser, by communication with the mortgagee, clearly take the mortgage debt on himself, as between his heir and executor, it will be considered a charge on the land; the mere covenanting with the mortgagor to pay the debt, will not make it his personal debt; and consequently *his personal estate, as between the heir and executor, will only be the auxiliary fund for payment of it (b) (1).

3. In cases of this nature equity always adverts to the intention of the purchaser, and disputes on this subject may therefore be prevented, by the insertion of a short declaration in the purchase-deed, whether the personal estate of the purchaser shall or shall not, as between his heir and executor, be the primary fund for payment of the mortgage money.

4. It seems that where a mortgagor has agreed to convey his equity of redemption to the mortgagee, the proceedings in an ejectment by the mortgagee cannot be stopped under the 7 Geo. 2, c. 20, for the effect of it would be to strip the mortgagee of his legal title, which might let in a posterior equitable right to the prejudice of the mortgagee, though he should thereafter obtain a decree for the performance of the agreement (c). But the relief will be

(a) *Post*, sect. 4.

(b) On this point see *Evelyn v. Evelyn*, 2 P. Wms. 659; and the cases in Mr. Cox's note; to which add, *Hamilton v. Worley*, 2 Ves. jun. 62; *Woods v. Huntingford*, 3 Ves. jun. 128; *Buller v. Buller*, 5 Ves. jun. 517; *Waring v. Ward*,

5 Ves. jun. 670; and 7 Ves. jun. 332; *Lord Oxford v. Lady Rodney*, 14 Ves. jun. 417; *Barham v. Lord Thanet*, 3 Myl. & Kee. 607; *Bickham v. Crutwell*, 3 Myl. & Cra. 763; *Rochfort v. Lord Belvidere*, 1 Wall. & Lyne, 45.

(c) *Goodtitle v. Pope*, 7 Term Rep. 185.

(1) See 1 Story Eq. Jur. §576; 4 Kent (6th ed.) 421; *Tweddell v. Tweddell*, 2 Brown C. C. (Perkins's ed.) 101, 108, notes; *Billinghurst v. Walker*, ib. 608 and note (a); *Cumberland v. Codrington*, 3 John. Ch. 229; *Butler v. Butler*, 5 Vesey (Sumner's ed.) 534 note (a); 2 Story Eq. Jur. §1248; *Fonbl. Eq. Bk.* 3, Ch. 2 §1 and notes; *Keyzey's case*, 9 Serg. & R. 72; 2 Jarman Wills (2d Am. ed.) 559 and notes; *McLearn v. McLellan*, 10 Peters, (S. C.) 625; *King v. Whitely*, 1 Hoff. Ch. Rep. 477; *Ancaster v. Mayer*, 1 Brown C. C. 454, in *White's Lead. Cas.* in Eq. 415 et seq. and notes.

granted to the mortgagor, where the mortgagee has not taken any steps to complete his contract for the purchase of the equity of redemption (*d*).

5. A mortgagee lending a further sum of money to the mortgagor, without notice of the sale of the equity of redemption, would bind the purchaser although his conveyance is registered (*e*); and therefore a purchaser of an equity of redemption of an estate should, immediately after the sale, give notice of it to the mortgagee, although the estate is in a registered county, and his conveyance is duly registered(*1*).

6. Another powerful reason why a purchaser cannot safely buy an equity of redemption without the concurrence of the mortgagee, even where the mortgage is not intended to be paid off, is, that he may be compelled to redeem *another* estate, for a mortgagee of two distinct estates upon distinct transactions from the same mortgagor is entitled to hold *both* even against the purchaser of the equity of redemption of one of the mortgaged estates, without notice of the *other* mortgage until payment of the whole money due on both mortgages (*f*). The mortgages must, however, be of the legal estate (*g*), and to the same person; and although the *doctrine has been sometimes doubted (*h*), yet it appears to be perfectly settled (*i*) (*2*)

7. If the mortgagee have lost the mortgage-deed, yet the purchaser, like every other mortgagor, would be compelled to pay the money upon a reconveyance, and an indemnity against the loss of the deed (*k*).

8. A mortgagee cannot be compelled to produce his deeds before he is paid off, unless he consents to a sale; for by that he submits to do everything that is necessary to a sale (*l*). This has often been ruled.

(*d*) *Skinner v. Stacy*, 1 Wils. 80.

(*e*) *Infra*, ch. 21.

(*f*) *Ireson v. Denn*, 2 Cox, 425; see *White v. Hillacre*, 3 You. & Coll. 597.

(*g*) *Jones v. Smith*, 2 Ves. jun. 376.

(*h*) *Ex parte King*, 1 Atk. 300; *Willie v. Lugg*, 2 Ed. 77.

(*i*) *Titley v. Davis*, Ambl. 733, cited, where both mortgages were by the same

deed. *Ex parte Carter*, Ambl. 733; *Tribourg v. Lord Pomfret*, ib. n. (2); *Roe v. Soley*, 2 Blackst. 726; *Cator v. Charlton*, Collett v. Munden, 2 Ves. jun. 377, cited.

(*k*) *Stokoe v. Robson*, 3 Ves. & Bea. 54; 19 Ves. jun. 385; see *Shelmardine v. Harrop*, 6 Mad. 41.

(*l*) *Anon. Mose*. 246.

(1) But registration, under the registry acts in the United States, is held to be constructive notice to all persons. 4 Kent (6th ed.) 174, 175; 1 Cruise Dig. by Mr. Greenleaf, vol. 2, Tit. 15, Mortgage, Ch. 3, §36, note, p. 106, note (1); 1 Story Eq. Jur. §419, in note.

(2) 1 Cruise Dig. by Mr. Greenleaf, vol. 2, Tit. 15, Ch. 3, §§ 54, 55.

9. And here it may be remarked, than an assignment should not in any case be taken of a mortgage, without the privity of the mortgagor as to the sum really due; for although it undoubtedly is not necessary to give notice to the mortgagor that the mortgage has been assigned (*m*), yet the assignee takes subject to the account between the mortgagor and the mortgagee, although no receipt be indorsed on the mortgage-deed for any part of the mortgage money which has been actually paid off (*n*) (1).

10. And I cannot refrain from observing, that there have been so many forged mortgages executed by persons in confidential situations, that no man should take a mortgage or a transfer of one without being well satisfied that it is a genuine instrument: the danger is not diminished now that the severity of the law against forgery has been relaxed.

11. Where a man sells an estate for an annuity without any agreement being made respecting the security to be given for it, he is entitled to have it secured, not only upon the estate, but also by the bond of the purchaser, and a judgment to be entered up against him (*o*). In *Ker v. Clobery* (*p*), which came before the Court upon a petition between the heir and executor, it appeared that the equity of redemption was sold to the mortgagee for the mortgage money, and a life annuity to be paid to the seller and his wife, and the survivor of them, but nothing was said as to the mode in which the annuity was to be secured. It was held to be *a purchase of the equity of redemption, subject to the annuity, which ought to be charged on the estate. It was an interest reserved by the seller out of the estate.

12. A purchaser of an estate subject to incumbrances must indemnify the vendor against them, although he did not expressly engage to do so.

13. Thus a purchaser of a leasehold estate must covenant with

(*m*) See 9 Ves. jun. 410.

(*o*) *Remington v. Deverall*, 2 Anstr.

(*n*) *Matthews v. Wallwyn*, 4 Ves. jun. 550; *qu.* as to the right to a judgment; 118. See 9 Ves. jun. 264; *Ferrall v. Bower v. Cooper*, 2 Hare, 408.

Boyle, 1 Ir. Eq. Rep. 391.

(*p*) V. C. 27 Mar. 1819, MS.

(1) The assignee of a mortgage takes it subject to all the equities existing between the mortgagor and mortgagee at the time of the assignment; and payments made after an assignment, but before notice of the assignment is given to the mortgagor, must be allowed to him. *James v. Morey*, 2 Cowen, 246. In this case, it was held that, as the registry acts did not require the registration of the assignment of a mortgage, such registration, in fact, made, would be no notice to a mortgagor, so as to render payment made by him to the mortgagee in his own wrong. 1b; S. C. 6 John. Ch. 417; 4 Kent (6th ed.) 174 and note; *Jackson v. Blodget*, 5 Cowen, 202; *Matthews v. Walwyn*, 4 Vesey (Sumner's ed.) 118 and note.

the vendor to indemnify him against the rents and covenants in the lease, although he is not required to do so by the agreement for sale (*q*).

14. So, although a purchaser of an equity of redemption enter into no obligation with the party from whom he purchases, to indemnify him from the mortgage-money, yet equity, if he receives the possession, and has the profits, would, independently of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the mortgage-money ; for having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage (*r*).

15. But where the mortgage was secured upon the estate sold, and also by a surety, and upon the sale the purchaser covenanted with the seller and his surety to pay the money, and to indemnify the seller and his security from the payment of it, it was held that the surety having been compelled to pay, could not recover in an action of assumpsit against the purchaser, but his only remedy was by an action by the seller upon the covenant. It was considered that it might have been otherwise, if there had been a mere conveyance without any covenant, for then the purchaser would have been the seller's substitute, and the surety would have been the surety of the purchaser (*s*).

16. And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit (*t*).

17. If a seller agree to give a real security as an indemnity to a purchaser upon his accepting the title, he will be compelled specifically to perform it, although he has not sufficient real estate, and offers a sufficient security upon personal estate (*u*).

18. Upon a sale of minerals, where the payment depends upon *the quantity gotten, the vendor is entitled by implication to power to enter, &c., to ascertain the quantity gotten (*v*).

19. A purchaser of an estate let to a tenant from year to year may, without a new contract, or any act corresponding to attornment, recover the rent ; and nothing would be a good defense in an action brought for it but the fact that he did not know of the sale,

(*q*) *Pember v. Mathers*, 1 Bro. C. C. Moo. 411.

52, *et supra*, p. 38.

(*r*) See 7 Ves. jun. 337, *per* Lord Eldon.

(*s*) *Crafts v. Tritton*, 8 Taunt. 365 ; 2

(*t*) *Per* Lord Eldon, in *Wood v. Griffith*, 12 Feb. 1818, MS.

(*u*) *Walker v. Barnes*, 3 Madd. 247.

(*v*) *Blakesley v. Whieldon*, 1 Hare, 176.

and had paid his rent before to his lessor (*x*). So, if the estate is in lease the purchaser is entitled to the benefit of covenants entered into by the lessee with the vendor (*y*) and may recover for a breach of the covenants before his time, if he is seised of the reversion during the continuance of the term (*z*); and he may, after notice to the tenant of the conveyance, distrain for rent in arrear (*a*), whether the estate be freehold or leasehold (I). But he cannot *recover arrears of rent due before the assignment, although it will carry the right to the whole of the accruing quarter or half-year (*b*), which of course would not be controlled by a contemporaneous

(*x*) See 1 Vern. & Scriv. 289; *Birch v. Wright*, 1 Term Rep. 378. See *Lumley v. Reisbeck*, 15 East, 99; *Rogers v. Humphreys*, 4 Adol. & Ell. 299; *Evans v. Elliot*, 9 Adol. & Ell. 342; see *Guinness v. Burr*, 1 Hayes & Jo. 735.

(*y*) See *post*, ch. 14.

(*z*) *Davis's case*, M. T. 42 Geo. III. *Woodfall's Land. & Ten.* 529, 2d edit. See *Lefroy v. Lee*, 1 Hayes & Jo. 721. As to the necessity of having the same

reversion, see now 7 & 8 Vict. c. 76, s. 12; 8 & 9 Vict. c. 106, s. 9.

(*a*) See *Moss v. Gallimore*, Doug. 259; *Pope v. Biggs*, 9 Barn. & Cress. 245; 4 Man. & Ry. 193; *Waddilove v. Barnett*, 2 Bing. N. C. 538; *Brook v. Biggs*, *ib.* 572; *Partington v. Woodcock*, 6 Adol. & Ell. 690; *Brown v. Storey*, 1 Mann. & Grang. 117; *Doe v. Barton*, 11 Adol. & Ell. 307.

(*b*) *Flight v. Bentley*, 7 Sim. 149.

(I) It was recently proposed to deprive all middle men, even in England, of the right to distrain for rent in arrear. Thus, suppose a building lease to be granted by John to James for ninety-nine years, at 10% a year; James builds a valuable house, and underlets to Joseph, for forty years, at 100% a year; and Joseph underlets to Jacob, for thirty years, at 120% a year; it is manifest that James has the greatest interest in the property; and, as the law now appears to stand, he can distrain for his rent, notwithstanding the last underlease. This right was proposed to be taken from him, but the measure was dropped.

In support of the measure, it was contended, that none but the original lessor is entitled to distrain for rent, according to the law of England; and therefore that, in the case which I have put, James would not be affected by the act; because he would not, as the law now stands, be entitled to distrain. The argument, which was managed with great ingenuity, was rested upon the statute of *quia emptores*, and some passages in Coke upon Littleton. When it is considered, that the right of distress, in the case above supposed, has never been disputed, it will not be matter of surprise, that the attempt to show that the practice is illegal did not succeed. That rent may be distrained for, although fealty is not incident to it, is laid down in Co. Litt. 142, b.; and it seems to be clear, that distress is incident to every rent at common law, where the lessor has a reversion; and that a reversion of a single day is, for this purpose, as operative as a reversion in fee. In the year book, 11 Edw. III. p. 8. Finchden thought, that if a lessee leased *all* his estate rendering rent, he could not distrain; he had no reversion. In the 2d Edw. IV. p. 11, the very objection was taken, where the lessor had a reversion; because it was only the reversion of a chattel; but it was held, that he had a right to distrain. In Brooke's Abridgment, Distress, case 45, and Rents, case 17, it is laid down, on the authority of this case, that if a man lease for twenty years, and the lessee leases over for ten years, rendering rent, there, if he grant the rent over to another man, he cannot distrain; because he has not the reversion of the term, which gives the right to distrain: contrary, if he had granted to him, the reversion and the rent. Note the diversity. In *Wade v. Marsh*, Latch, 211, it was held, that the lessor having only a reversion for years, may, by the common law, distrain for the rent, by reason of the reversion, which causes privity. These cases appear to be quite decisive. The only difficulty has been to find a case; for the point has not been doubted for centuries.

parol agreement to divide the accruing rent (c); nor can he recover if he purchase after the term ended for a breach during the term, although there has been a continuing tenancy, for the tenant is liable to his original landlord on his breach of covenant, and cannot also be liable to the purchaser, the new landlord, for the same damage arising from the breach of his implied undertaking. If the seller has sold the estate for a lower price because he is to have the remedy against the tenant, he may sue on his own account: if he has received the full price, on the ground that the damage is to be made good, he may sue as a trustee for his vendee (d).

20. And here we may observe, that by a late act (e), all rents service reserved on any lease by a tenant in fee, or for a life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all other rents, &c., made payable or becoming due at fixed periods under any instrument executed after the passing of the act, or (being a will or testamentary instrument) that shall come into operation after the passing of the act, are upon the death of any person interested in such rents, or on the determination by any other means, of the interest of any such person, made apportionable in favor of such person or his personal representatives, unless it shall be expressly stipulated that no apportionment shall take place.

21. Where a business is sold with a house, as in the case of a public-house, it is sometimes usual to insert an agreement that in case the seller carry on a similar business during a limited period within a specified distance of the house, he shall pay a sum named as liquidated damages. Where the agreement is properly framed and the instrument is under seal, and even perhaps if it be not under seal, the whole sum, in case of a breach may be recovered, *and at all events, although no damage is proved, yet the jury may give as damages the whole amount of the sum fixed (f). Where the parties have expressly stipulated that in case of a breach by either, he shall pay a sum named as liquidated damages, the whole sum may, if the agreement be broken, be recovered at law (g) (1).

(c) *Flinn v. Calow*, 1 Man. & Grang. 589.

Browne v. Amyot, 3 Hare, 173.

(d) *Johnson v. Churchwardens of St. Peter*, 4 Adol. & Ell. 520.

(f) *Crisdee v. Bolton*, 3 Carr. & Pay. 240; see *Randall v. Everest*, 2 Carr. & Pay. 577, 1 Mood. & Malk. S. C.

(e) 4 & 5 Will. 4, c. 22 (16 June 1834).
See *in re Markby*, 4 Myl. & Cra. 484;

(g) *Reilly v. Jones*, 1 Bing. 302; 8 Moo. 244.

(1) *Chitty Contr.* (8th Am. ed.) 758 et seq. and notes; *Dakin v. Williams*, 17 Wendell, 447; *Williams v. Dakin*, 22 Wendell, 201; *Pearson v. Williams*, 26

22. An assignment of a legacy as sterling money will carry the stock in which it is invested under a will, and the purchaser will be entitled to the rise, or must bear the fall, as the case may be, if the money was at the time of the sale invested in the funds, and the intention was to sell the fund in its actual state of investment (*h*).

23. Where a policy of assurance on a life was sold by auction, and the particulars did not state that the seller had only a redeemable interest in the life assured, and the interest was afterwards redeemed, it was held that after the purchase was completed the purchaser could not recover damages for the fraud, as it was proved that the practice of the office was to pay such policies, although of course there was no legal right to recover under the policy (*i*).

24. A *bona fide* purchase of an interest will not be converted into a loan, on account of a power to repurchase being given to the seller, although at an advanced price; but, if the purchaser, instead of taking the risk of the subject of the contract (*e. g.* an annuity) on himself, take a security for repayment of the principal, that will vitiate the transaction, and render it a mere mortgage security (*j*) (1).

(*h*) Lucas v. Bond, 2 Kee. 136.

(*j*) Verner v. Winstanley, 2 Sch. &

(*i*) Barber v. Morris, 2 Moo. & Malk.

Lef. 393. See Sevier v. Greenway, 19 Ves. jun. 413.

Wendell, 630; Slosson v. Beadle, 7 John. (2d ed.) 72 note (a); Hasbrouch v. Tappen, 15 John. 200. The question, what is liquidated damages, and what a penalty, is often a difficult one. It is not always the calling of a sum, to be paid for breach of contract, liquidated damages, which makes it so. In general, it is the tendency and preference of the law, to regard a sum, stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages: because then it may be apportioned to the loss actually sustained. Per Shaw Ch. J. in Shute v. Taylor, 5 Metcalf, 67.

(1) A sale, with an agreement for a re-purchase within a given time, is totally distinct from, and not applicable to mortgages. Such conditional sales or defeasible purchases, though narrowly watched, are valid, and to be taken strictly as independent dealings between strangers. 4 Kent (6th ed.) 144. If it be doubtful whether the parties intended a mortgage, or a conditional sale, courts of equity incline to consider the transaction a mortgage, this being the more just and equitable construction, and one which tends to prevent oppression. Poin-dexter v. McCannon, 1 Dev. Eq. Cas. 373; Skinner v. Miller, 5 Litt. 84; Secest v. Turner, 2 J. J. Marsh. 471; Edrington v. Harper, 3 J. J. Marsh. 354; Crane v. Bonnell, 1 Green. Ch. 264. If a debt still subsists, and the relation of debtor and creditor remains, it is a mortgage; but if the debt be extinguished by the agreement of the parties, or the money advanced is not by way of loan, and the grantor has the privilege of refunding, if he pleases by a given time, and thereby entitle himself to a reconveyance, it is a conditional sale. See v. Manhattan Co. 1 Paige Ch. 56; Flagg v. Mann, 14 Pick. 467; S. C. 2 Sumner, 534; Goodman v. Grierson, 2 Ball & Beat. 274; Conway v. Alexander, 7 Cranch, 237; Robinson v. Cropsey, 2 Edwards, 138; Holmes v. Grant, 8 Paige, 243; Webb v. Patterson, 7 Humph. 431; Page v. Foster, 7 N. Hamp. 392; Porter v. Nelson, 4 N. Hamp. 130; Rice v. Rice, 4 Pick. 349; Wharf v. Howell, 5 Binney, 499; Glover v. Payn, 19 Wendell, 518. Adequacy of price paid, and want of an obligation to repay the

25. If a purchaser agree to pay an addition to the purchase-money, provided the adjoining property be improved in a stipulated manner before a day named, the money cannot be recovered if the seller do not make all the improvements before that day; in other words, the condition must be performed to entitle him to the money (*k*).

26. If a power to re-purchase be given upon a condition, for example, that rent be in the meantime regularly paid, the right cannot be enforced unless the condition has been complied with, for it is not a stipulation for penalty or forfeiture, but a privilege conferred (*l*) (*1*).

*27. Where a power is given by an Act of Parliament to purchase the estate of a third person for a public purpose; with the usual provisions for ascertaining its value, if the terms offered are not accepted; the party empowered to purchase, if he give a regular notice to purchase, cannot withdraw from it, but will be compelled to take the estate (*m*).

28. A provision in a railway act that the costs of the contracts, sales, and conveyances shall be borne by the purchasers, includes the vendor's costs of making out his title (*n*).

29. If a man has agreed to grant a lease, he should be cautious in purchasing the interest of an under-lessee or of an assignee of part, that he do not subject himself to the liabilities of the seller, and release the original lessee from his obligations (*o*).

30. It may here be observed, that the grant of the office of a steward of a manor for life is not revoked by a subsequent sale of the manor, but is binding on the purchaser; although, as lord, he

(*k*) *Maryon v. Carter*, 4 Carr. & Pay. 295: see the form of the pleadings.

(*l*) *Davis v. Thomas*, 1 Russ. & Myl. 506. See and consider *Williams v. Owen*, 10 Sim. 386; *Perry v. Meddowcroft*, 4 Beav. 197.

(*m*) *The King v. Hungerford Market*

Company, 1 Nev. & Mann. 112.

(*n*) *Ex parte* Feoffees of Addie's Charity, 3 Hare, 22. As to expenses of investment, see *Ex parte* Bishop of Durham, 3 You. & Coll. 690.

(*o*) *Jenkins v. Portman*, 1 Kee. 435.

purchase money, are important facts tending to show a conditional sale, though not conclusive. *Brown v. Dewey*, 2 Barbour Sup. Ct. R. 28; *Flagg v. Mann*, 2 Sumner, 534; *Smith v. Peoples Bank*, 24 Maine, 185. On the other hand, gross inadequacy of price is a strong circumstance to show that the transaction was intended as a mortgage. *Conway v. Alexander*, 7 Cranch, 218, 241; *Oldham v. Halley*, 2 J. J. Marsh. 114; 1 Cruise Dig. by Mr. Greenleaf, vol. 2, Tit. 15, ch. 1, §38, and note.

In *Waters v. Randall*, 6 Metcalf, 482, Mr. Justice Hubbard said:—"We have no doubt, that conditional agreements may be made for the purchase of lands, and that sales of estates also, upon good consideration, may take place, in which the vendor may contract for the repurchase of the same. But such contracts must be *bona fide*, and not a mere cover for a loan of money."

(1) See 4 Kent (6th ed.) 144 and note; *Robinson v. Cropsey*, 2 Edwards, 138.

will be entitled to the custody of the court-rolls. In purchasing a manor, therefore, the instrument by which the steward was appointed should be called for. This is a precaution which has never been attended to.

SECTION III.

OF SPECIFIC PERFORMANCE.

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| <ol style="list-style-type: none"> 1. <i>No specific performance by Court of Review.</i> 2. <i>Form of decree.</i> <ol style="list-style-type: none"> I. Against the vendor. 3. <i>Heir at law bound.</i> 4. <i>Infant heir of vendor.</i> 5. <i>Devisees in strict settlement of vendor.</i> 6. <i>Tenant in tail.</i> 7. <i>Provisions by statute.</i> 8. <i>Equitable tenant in tail.</i> 9. <i>Tenants in tail of copyholds.</i> 12. <i>Doweress.</i> 13. <i>Joint tenant.</i> 14. <i>Feme covert.</i> 15. <i>Where she has a power.</i> 16. <i>Decree against the husband.</i> 20. <i>Feme covert with separate estate, purchasing.</i> 22. <i>Lunatic; effect of lunacy on contract.</i> 23. <i>Trustees under power.</i> 24. <i>Infant.</i> <ol style="list-style-type: none"> II. As regards the agreement. 28. <i>Sale of annuity, stock, &c.</i> 29. <i>Discretionary.</i> 30. } <i>Misrepresentation by purchaser or</i> 31. } <i>seller.</i> | <ol style="list-style-type: none"> 32. <i>General statements.</i> *33. <i>Value.</i> 34. <i>Intoxication.</i> 36. <i>Where the action is lost.</i> 37. <i>Damages recoverable at law.</i> 38. <i>Hardship of sale upon seller.</i> 39. <i>Want of competency.</i> 41. <i>Purchase of lease or under lease.</i> 42. <i>Suppressio veri : suggestio falsi.</i> 43. <i>Mistake.</i> 44. <i>Surprise.</i> 45. <i>Fraudulent misrepresentation.</i> 46. <i>Sale by agent contrary to authority.</i> 47. <i>Breach of trust.</i> 49. <i>Discretionary power in trustees.</i> 50. <i>Sale by tenant for life.</i> 52. <i>Seller not owner.</i> 54. <i>Want of title.</i> 56. <i>Equitable title.</i> 57. <i>Purchaser nominal contractor.</i> 61. <i>Seller pretending to be an agent.</i> 62. <i>Sale of annuity for lives not named.</i> 63. <i>Specific performance where no action will lie.</i> 69. <i>Penalty : specific performance.</i> 70. <i>Penalty : action.</i> |
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THE observations in a preceding section (a), lead us now to inquire, in what cases a court of equity will decree a specific per-

(a) Section I.

formance ; which, for the purposes of this work, may be comprised under two heads. First, with respect to the vendor ; secondly, with respect to the agreement itself.

1. I may premise that the Court of Review in bankruptcy has not jurisdiction to compel a specific performance where an estate is sold under the common order of the court on the petition of an equitable mortgagee (*b*).

2. As to the form of the decree, Lord Eldon observed, that, according to the old practice, there were two ways of framing a decree for specific performance. The one was to declare that the plaintiff was so entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title ; the other to refer the title to the Master, and to follow up that direction by a declaration, that if a good title was shown the agreement ought to be specifically performed ; and he added, that in his opinion difficulties may often arise from omitting to make a declaration in the decree (*c*). And upon another occasion he observed, that in suits for specific performance, where the question of title is not the only issue, but the defendant insists that, whether the title be good or bad, the plaintiff is for any reason not entitled to specific performance, it is specially necessary that there should be in the first instance a declaration that the plaintiff is entitled to have the contract specifically performed if a good title be shown (*d*). But still it is quite settled, that in the common case a mere reference of the title is an implied declaration of the plaintiff's right to a specific performance if the title prove to be good (*1*).

*3. In regard to the vendor,—if a man, seised in fee-simple, or *pur autre vie* (*e*), contract for the sale of his estate, and die before the conveyance is executed, his heir at law will be decreed to perform the agreement *in specie*, although he covenanted for himself only, and not for his heirs (*f*) (*2*).

4. It was a point of great controversy whether the 7 Anne, c. 19, enabled an infant heir at law to convey in performance of a contract made by his ancestor. It is now sufficient to refer to the

(*b*) *Ex parte* Cutts, 3 Deac. 242.

(*c*) 3 Russ. 182.

(*d*) Pitt v. Davis, 3 Swanst. 182, n.

(*e*) Stevens v. Baily, 2 Freem. 199,

cited ; Nels. Cha. Rep. 106, reported ;
see Anon. 2 Freem. 155.

(*f*) Gell v. Vermedum, 2 Freem. 199.

(1) See Scaton's Forms of Decrees, 209 et seq. ; 2 Daniell Ch. Pr. (Perkins's ed.) 1195 et seq.

(2) See Rev. Stat. Mass. Ch. 74, §8 et seq. ; Glaze v. Drayton, 1 Desaus. 190 ; Swartwout v. Burr, 1 Barbour, 495.

cases (g), for that act was repealed by the 6 Geo. 4, c. 74; but even the latter act was held not to embrace constructive trusts (h). The law now depends upon the 1 Will. 4, c. 60, which enables conveyances to be made by committees of trustees and by lunatics, although not found so by inquisition, and by infant trustees (i); and (i) it provides that every person, being in other respects within the meaning of the act, shall be, and be deemed to be, a trustee within the act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform. And it expressly enacts (k), that where any land shall have been contracted to be sold, and the vendor, or any of the vendors, shall have died, either having received the purchase-money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract, either wholly or as far as the same remains to be executed, or as far as the same, by reason of the infancy, can be executed, shall have been decreed by the Court of Chancery (l), in the lifetime of such vendor, or after his decease (l), and where one person shall have purchased in the name of another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court, either before or after the death of such nominal purchaser, shall have declared him to be a trustee for the real purchaser, then in every such case the heir of such vendor, or of such nominal purchaser or his heir, in whom the *premises shall be vested, shall be a trustee for the purchaser within the act.

5. The act then provides (m), that where any land shall have been contracted to be sold, and the vendor or any of the vendors shall have died, having devised the same in settlement, so as to be vested in any person for life or other limited interest, with any remainder, limitation or gift, and which may not be vested, or may

(g) See *Ex parte Vernon*, 2 P. Wms. 549; *Sikes v. Lister*, 5 Vin. Abr. 541, pl. 28; *Goodwin v. Lister*, 3 P. Wms. 387; S. C. MS.; *Hawkins v. Obeen*, 2 Ves. 559; *Fearne's Posthuma*, 236; *Jerdon v. Forster*, 1 Sand. on Uses, 283, cited, 3d edit. *Ex parte Janaway*, 7 Price, 679; *Smith v. Hibbard*, 2 Dick. 730;

Oneby v. Price, *Fearne's Post.* 239.

(h) *Dew v. Clarke*, 4 Russ. 511; *King v. Turner*, 2 Sim. 550.

(i) Sec. 15.

(k) Sec. 16.

(l) *Prytharch v. Havard*, 6 Sim. 9.

(m) Sec. 17.

(I) The powers are extended to the Court of Exchequer, &c. &c. See 26, 31; and see 3 Vic. c. 60.

(1) See *Swartwout v. Burr*, 1 Barbour, 495.

be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, either wholly or so far as the same remained to be executed, shall have been decreed by the Court, it shall be lawful for the Court to direct such tenant for life, or other person having a limited interest, or the first executory devisee thereof to convey the fee-simple or other the whole estate contracted to be sold to the purchaser, or in such manner as the court shall think proper. The act is then (n) extended to other cases of constructive trusts, but is not to extend to a vendor, except in any case before expressly provided for (o) (I).

(n) Sec. 18.

(o) See *King v. Leach*, 2 Hare, 57.

(I) The *general* powers of this act are extended to the heirs and devisees out of the jurisdiction, or the like, of a mortgagee where the latter was not in possession of the estate, or in receipt of the rents, and the money due shall have been paid or shall be paid to his executor or administrator. 1 & 2 Vict. c. 69. And by the 4 & 5 Will. 4, c. 23, the powers are extended to cases of trustees and mortgagees dying without an heir; and escheats and forfeitures as to trustees and mortgagees are abolished except to the extent of any beneficial interest; and even previous escheats and forfeitures are, within certain limits, relieved against.

Considerable difficulty has arisen in regard to mortgagees under these acts, and further provision appears to be necessary in order to clear up all doubt on this head. The 6 Geo. 4, c. 74, s. 5, included expressly persons seised by way of mortgage, as well as those seised upon any trust within its general provisions. In the 1 Will. 4, c. 60, s. 8, the words, *by way of mortgage*, were purposely omitted, and it was accordingly repeatedly decided that the latter act did not embrace mortgagees or their heirs: see *Jemmett* on the Statutes, p. 150. The 4 & 5 Will. 4, c. 23, which related to escheat and forfeiture, referred to the 1 Will. 4, c. 60, as if it did include the heir of a mortgagee. This was a palpable error, but it was decided that it had the effect of enlarging the previous statute of Will. 4, so that the heirs of mortgagees were included within its operation. *In re Stanley*, 7 Sim. 170; *Ex parte Whitton*, 1 Keen, 278. But this is a very doubtful point, and if this be the true construction, the remedy would apply to the mortgagee himself, which clearly was not intended, and this was the objection to the 6 Geo. 4, which, although it included mortgagees, made no provision for the payment of the mortgage-money. *Ex parte Whitton* has, however, been followed by *In re Thomson*, 12 Sim. 392.

In order to remove the existing difficulties, the 1 & 2 Vict. c. 69, was passed. It provides that where any mortgagee shall have died *without having been in possession of the land, or in the receipt of the rents and profits thereof*, and the money due in respect of such mortgage shall have been or shall be paid to his executor or administrator, and the devisee, or heir, or other real representative, or any of the devisees, or heirs, or real representatives of such mortgagee shall be out of the jurisdiction, or not amenable to the process of the Court, or it shall be uncertain, where there were several devisees or representatives, who were joint tenants, which of them was the survivor, or it shall be uncertain whether any such devisee, or heir, or representative be living or dead, or if known to be dead it shall not be known who was his heir; or where such mortgagee, or any such devisee, or heir, or representative shall have died without an heir, or in case of neglect to convey, &c., the Court may appoint a person to convey, in like manner as, by the act of 1 Will. 4, c. 60, the Court is empowered in the place of a *trustee* or the heir of a *trustee*.

But it is provided that the acts of 1 Will. 4, c. 60, and the 4 & 5 Will. 4, c. 23, or either of them, should not be construed to extend to any case of any person dying seised of any land by way of mortgage other than such as were *therein before* expressly provided for.

*6. An agreement by a man seised in tail was, of course, binding on himself, but it could not be enforced against the issue in tail, if *the entail was not effectually barred, although the ancestor covenanted for that purpose (*p*), and received part, or even the whole of the purchase-money, and a decree was made against him, and he died in contempt, and in prison, for not obeying the decree (*q*): the ground of which determinations was, that the issue in tail claim

(*p*) *Cavendish v. Worsley*, Hob. 203; *Ross v. Ross*, 1 Cha. Ca. 171; *Sayle v. Freeland*, 2 Vent. 350; *Jenkyns v. Keymes*, 1 Lev. 237; which overruled the *dictum* in *Hill v. Carr*, 1 Cha. Ca. 294. (*q*) *Powell v. Powell*, Prec. Cha. 278; *Weal v. Lower*, 2 Vern. 306, cited; *Sangon v. Williams*, Gilb. Eq. Rep. 104, cited; and see 1 Ves. 224; *Frank v. Mainwaring*, 2 Beav. 126.

This proviso was added under the impression that the act into which it was introduced provided for all the cases in which mortgages were to be affected in the hands of representatives; but it seems that it does not include either the case of an infant heir of a mortgagee or the case where it is uncertain whether the mortgagee has left an heir, and yet it has been held that the *former* act still embraces both those cases, for the third section, it was said by the Court, was introduced into the act of 1 & 2 Vict. in order to confine *its* application to those cases which are expressly mentioned in it. That section, it was observed, was not intended to repeal any part of the two former acts, but that those acts were to be construed just as before, and the act of the 1 & 2 Vict. c. 69, was intended to apply to those cases only which it expressly provides for. *In re Wilson*; *In re Gathorne*, 8 Sim. 392.

Now the 1 & 2 Vict. c. 69, is properly confined to cases where the mortgagee has not been in possession of the land, or in the receipt of the rents or profits, and the money must have been or must be paid to his executor or administrator, and without those provisions it would not be proper to invest the Court with a summary jurisdiction in such cases, nor did the acts previous to the 1 & 2 Vict. intend to give any such powers; and yet it would follow from the decision above quoted, that the cases not included in the 1 & 2 Vict., but held to be within the acts of Will. 4, would fall within the powers of the latter, although the mortgagee had been in possession of the land or in the receipt of the rents or profits; and there is no provision for the payment of the mortgage-money in the acts of Will. 4.

It is submitted, however, that the terms and operation of the proviso in the 1 & 2 Vict. c. 69, were not correctly stated in the cases of *Wilson* and *Gathorne*, for the proviso is not that *that act* shall be confined in its application to the cases which are expressly mentioned in it, but that the acts of the 1 Will. 4, c. 60, and 4 & 5 Will. 4, c. 23, shall not extend to any case of a mortgage other than such as were, by the 1 & 2 Vict. c. 69, expressly provided for. It appears to be still necessary to have an act passed to include within the 1 & 2 Vict. c. 69, the cases of an infant heir, and the cases where it is uncertain whether there is an heir, *subject to the same guards* as are provided for the cases already within the act, and the cases of escheat will require to be reconsidered with reference to the 4 & 5 Will. 4, c. 23, and the provisions in the 1 & 2 Vict. c. 69, s. 1, coupled with the proviso.

In the late case of *In re Williams*, *Ex parte Bird*, 9 Sim. 426, where the mortgagee was stated to have *left an heir*, but it was not known who was his heir, the Vice-Chancellor held clearly that the case was not within either of the acts of the 4 & 5 Will. 4, c. 23, and 1 & 2 Vict. c. 69, and that as to 1 Will. 4, c. 60, it appeared from the change of the language of the 8th section, from that used in the 5th and 6th sections, that the legislature meant that section to apply to a trustee, and not to the case of a mortgagee, and therefore this case was one expressly intended by the legislature not to be provided for by the statute; and yet, upon further consideration, 9 Sim. 642, he held the case to be within the 1 Will. 4, coupled with legislative exposition of that enactment given by the 4 & 5 Will. 4; *sed qu.*

per formam doni, from the creator or author of the estate tail; and therefore, though the power of tenant in tail by a particular conveyance, that not being done, the Court cannot take away the right they derive, not from the tenant in tail, but from the author of the estate tail (r).

7. This was the old rule. And now that fines and recoveries have been abolished, and new and simpler forms of barring entails have been established, it is specially provided that no disposition by a tenant in tail, resting only in contract either express or implied, or otherwise, and whether supported by a valuable consideration or not, shall be of any force at law or in equity under the act (s), and that in cases of dispositions by tenant in tail under the act, the jurisdiction of equity shall be altogether excluded on behalf of a person claiming for a valuable consideration in regard to the specific performance of contracts (t); but although this prevents a Court of Equity from treating a contract or an invalid disposition as a complete or valid bar upon the ground upon which contracts are specifically executed, yet it does not prohibit the exercise of the old power of enforcing a specific performance of a contract against the tenant in tail himself; and by another recent act the Court itself may execute the decree against a tenant in tail in custody for a contempt (u).

8. A distinction, however, was formerly taken, where the ancestor was only equitable tenant in tail; and the Court would in that case, it is said, relieve against the issue (x) because equitable estates tail are mere creatures of the Court, and not within the *statute *de donis*. But later authorities (y) had settled that an equitable estate tail in freeholds could not be barred by a mere deed, but only by a fine or recovery, and now by the substitution for recoveries act it is provided that no disposition by a tenant in tail in equity shall be of any force unless such disposition would, in case of an estate tail at law, be an effectual disposition under the statute in a court of law; and the provisions before referred to, limiting the operation of contracts and excluding the jurisdiction of equity in cases of invalid dispositions, apply equally to a con-

(r) See 2 Ves. 634.

(s) 3 & 4 Will. 4, c. 74, s. 40; and see *post*, ch. 11, s. 4.

(t) 3 & 4 Will. 4, c. 74, s. 47; and see *post*, ch. 11.

(u) 1 Will. 4, c. 36, s. 15, Rule 15.

(x) *Norcliff v. Warsley*, 1 Cha. Ca. 234; *Sayle v. Freeland*, 2 Vent. 350; and see 1 Pow. Contr. 126.

(y) *Legate v. Sewell*, 1 P. Wms. 91; *Harvey v. Parker*, 10 Vin. Abr. 266, pl. 6, affirmed in *Dom. Proc.*; *Kirkham v. Smith*, Amb. 318; *Radford v. Wilson*, 3 Atk. 815; *Boteler v. Allington*, 1 Bro. C. C. 72; *Burnaby v. Griffin*, 3 Ves. jun. 266; and see *Fletcher v. Tollet*, 5 Ves. jun. 13.

tract or disposition by an equitable tenant in tail (z). It follows, therefore, that equity could not consider the issue of an equitable tenant in tail to be bound by a mere agreement entered into by their ancestor (a).

9. The same observations seemed to apply to legal and equitable estates tail in copyholds, for a legal entail could only before the late act have been barred according to the custom of the manor of which the copyhold estate was holden; and perhaps the better opinion was, that the same steps must have been taken to bar an equitable estate tail in copyholds, as must have been pursued in the case of a legal entail. Lord Hardwicke, however, appears to have thought (b) that a mere surrender was in every case sufficient to bar an *equitable* estate tail in copyholds; but the contrary opinion was entertained by the Profession, and appeared to be authorized by a case cited in several books from the papers of the late Mr. Powell (c), in which it was held, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate tail* (d), (I). *Indeed the power of tenants in tail, to bind their issue, ought to be the same, whether the estate be freehold or copyhold, and whether the entail be legal or equitable; the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, should have been adhered to in this instance.

10. But now, by the 3 & 4 Will. 4, c. 74, a surrender is made a sufficient bar of even a legal estate tail, and equitable tenants in tail may bar the entail either by surrender or by deed, accompanied by the solemnities required by the act (e). But in each case the

(z) 3 & 4 Will. 4, c. 74, s. 47.

(a) Storey v. Saunders, 1 Hayes & Jo. 519.

(b) Radford v. Wilson, 3 Atk. 315; and see the judgment of Lord Chanc. Apsley, in Grayme v. Grayme, 1 Watk. Cop. 180; and see Pow. Contr. 126. See Pullen v. Lord Middleton, 9 Mod.

483.

(c) Hale's case, Ch. 11th Dec. 1764; and see Roe v. Lowe, 1 Hen. Blackst. 446.

(d) And see 1 Walk. Copyh. 181; 1 Preston on Convey. 155.

(e) Sec. 50-54.

(I) Note: This appears to be an extract from Mr. Booth's opinion on this case. The case itself appears to have been decided on the ground that the remainderman claiming in equity under the covenant for the settlement was a mere volunteer.

provisions of the act must be complied with, or the issue will not be bound (*f*).

11. Where by the custom of a manor, and it is the custom of most manors, a tenant was complete master of his estate, independently of his wife, and could by his own act alone bar her free bench; an agreement by him for sale of his estate would have been enforced against the wife, if he died before it was carried into execution (*g*).

12. But an agreement for sale of a freehold estate could not before the late act have been carried into execution against a widow entitled to dower. The distinction was founded upon this ground; that a husband had it in his power, during his life, to sell his copyhold estates, and thereby bar his wife's expectancy; but if a wife's right to dower once attached on a freehold estate, no act of the husband's alone could divest it. By the late act (*h*), however, a wife's dower is put altogether into the husband's power, and it is specially provided, that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, and that all partial interests, and all charges created by any disposition of a husband, and all contracts to which his land shall be subject, shall be valid as against the right of his widow to dower.

13. Equity will enforce an agreement by a joint tenant for sale of his share against the survivor, if the articles amount to an equitable severance of the jointure (*i*): and a covenant to sell, though it does not sever the joint-tenancy at law, will in equity (*k*).

*14. An agreement by a *feme covert* for sale of her estate, cannot be enforced either at law or in equity (*l*)(1), unless the estate be

(*f*) Sec. 40, 47, *supra*.

(*i*) *Musgrave v. Dashwood*, 2 Vern.

(*g*) *Hinton v. Hinton*, 2 Ves. 631, 638; 45, 63. See 2 Ves. 634.

Ambl. 277; *Brown v. Raindle*, 3 Ves.

(*k*) See 3 Ves. jun. 257; *Frewen*

jun. 256, which overruled *Musgrave v.*

Relfe, 2 Bro. C. C. 220.

Dashwood, 2 Vern. 45, 63.

(*l*) *Emery v. Wase*, 5 Ves. jun. 846.

(*h*) 3 & 4 Will. 4, c. 105, s. 4, 5.

(1) It seems to be universally true, that though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert* with the assent of her husband, for the sale of her real estate, is absolutely void at law, and the courts of equity never enforce such a contract against her. *Butler v. Buckingham*, 5 Day, 492. See also *Watrous v. Chalker*, 7 Conn. 224; 2 Kent (6th ed.) 168; *Emery v. Wase*, 5 Sumner's Vesey, 849 note (4); *Dunlap v. Mitchell*, 10 Ohio, 117. It has been repeatedly held that a wife is not liable on her covenants in a deed. *Fowler v. Shearer*, 7 Mass. 21; *Colcord v. Swan*, ib. 291; *Jackson v. Vanderheyden*, 17 John.

settled to her separate use, so as to enable her to dispose of it as if she were sole (*m*) (1), nor will an agreement by her husband bind her (*n*). Of the incapacity of a married woman, or her husband, to bind her real estate, unless [formerly] by a fine or recovery, there is a striking instance in the year books in the reign of Edward the Fourth (*c*). A woman *cestui que use* and her husband joined in the sale of her estate; the wife received the money, and she and her husband begged her feoffee to convey the estate to the purchaser, which he accordingly did. The husband died, and then the wife filed a bill against the feoffee for a breach of trust. The cause was heard in the Exchequer Chamber, before the Chancellor and the judges of both benches, who held, that the sale was in fact the sale of the husband; that the receipt of the money by the wife was immaterial, and the sale was void; that the trustee was answerable for the breach of trust; and as the purchaser knew he was buying a married woman's estate, that the wife might recover the estate from him.

15. And it is doubtful whether a married woman having a power of appointment can bind herself by a contract to sell the property. Sir Thomas Plumer thought not, because with a married woman there can be no binding contract, the instrument is not good as an agreement. Her disability as a married woman is taken away if she pursue her power. But where the instrument is not executed according to the power, it is nothing but an agreement signed by a married woman, and as an agreement it is invalid. But this opinion was extra judicial, and he said he did not mean to

(*m*) See *Davidson v. Gardiner*, MS. post, ch. 19.

(*n*) See *Daniel v. Adams*, Anbl. 495: 1 Eq. Ca. Abr. 62, pl. 2, side note, which corrects the *dictum* in *Baker v. Child*, 2 Vern. 61. It was said by Murray, Solicitor-general, and agreed to by Lord Hardwicke, that there was no decree in

Baker v. Child, in Reg. Lib., but it was referred to arbitration; and this is confirmed by a MS. in my possession, which states the reference to have been to Mr. Justice Rawlinson; and see *Martin v. Mitchell*, 2 Jac. & Walk. 413.

(*c*) 7 Edw. 4, 14, b.

167; *Martin v. Dwelly*, 6 Wendell, 1; *Wadleigh v. Glines*, 6 N. Hamp. 17. See *Green v. Branton*, Dev. Eq. 500. Whether the wife's covenant might not operate by way of estoppel. See *Colcord v. Swan*, 7 Mass. 291; *Hill v. West*, 8 Ohio, 225; *Jackson v. Vanderheyden*, 17 John. 167; 2 Kent (6th ed.) 168.

(1) See *Aylett v. Ashton*, 1 Mylne & Cr. 105; *Bunce v. Vandergrift*, 8 Paige, 37; *Helms v. Franciscus*, 2 Bland, 544; *Long v. White*, 5 J. J. Marsh. 230; *Benett v. Oliver*, 7 Gill & John. 192. But a *feme covert*, with respect to her separate property, is to be considered as a *feme sole*, to the extent only of the power given to her by the settlement. If she has a power of appointment by *will*, she cannot appoint by *deed*: or when she is empowered to appoint by *deed*, the giving a bond, or note, or parol promise, without reference to the property, or making a parol gift of it, is not such an appointment. *Meth. Epis. Church v. Jaques*, 3 John. Ch. 77.

give a definitive opinion (*p*). In a later case (*q*), where a legal estate for life was vested in a married woman for her separate use, or to the use of such persons as she by writing under her hand and seal should appoint, and in default of appointment for her separate use, and she and her husband gave a promissory note, and signed and delivered to the creditor a memorandum not under seal, *whereby they agreed to appoint and convey in mortgage the property settled to the creditor in fee to secure the note, the Master of the Rolls held her bound by her contract (*l*).

16. If, however, a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement *in specie* (*r*) ; because it has been said, it is to be presumed that the husband, where he covenants that his wife shall levy a fine, has first gained her consent for that purpose (*s*) ; but this does not seem to be the true ground, for although the wife swear by her answer that she never assented to the agreement, yet the husband will not be let off (*t*). The principle upon which the Court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it ; and, therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age (*u*), (*l*).

17. There have been instances of committing the husband to the Fleet, until the wife should convey the estate ; but if he should make it appear, that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation as if the agreement had never been executed (*x*).

(*p*) *Martin v. Mitchell*, 2 Jac. & Walk. 413 ; *Daniel v. Adams*, Ambl. 495 ; *semble* in favor of her being bound, see 2 Sugd. Pow. 97 ; and see *post*, pl. 21.

(*q*) *Stead v. Nelson*, 2 Beav. 245.
(*r*) *Hall v. Hardy*, 3 P. Wms. 187 ; *Barrington v. Horne*, 2 Eq. Ca. Abr. 17, pl. 7 ; *Morris v. Stephenson*, 7 Ves. jun. 474. See *Wheeler v. Newton*, Prec. Cha. 16 ; *Haddon's case*, Toth. 205 ; and see *Griffin v. Taylor*, *ib.* 106, edit. 1649.

(*s*) *Winter v. Devreux*, 3 P. Wms. 190, n. (B).

(*t*) *Withers v. Pinchard*, 7 Ves. jun. 475, cited.

(*u*) *Anon.* 2 Cha. Ca. 53.

(*x*) See note to *Hall v. Hardy*, 3 P. Wms. 187 ; *Ortread v. Round*, 4 Vin. Abr. 303, pl. 4 ; 8 Ves. jun. 510 ; and *Emery v. Wase*, 5 Ves. jun. 816 ; and see *Sedgwick v. Hargrave*, 2 Ves. 57.

(*l*) And it is no plea to an action at law for breach of the agreement, to say, that the third person had nothing to do with it, or no estate in it, for the defendant hath undertaken to procure it, and must at his peril.—*Stoughton v. Hawley*, M. 1 W. & M. Rot. 662, B. R. judgment in II. after. MS. A question has been raised, whether if the husband having contracted to sell his wife's estate as owner, dies, she may enforce the contract against the purchaser. *Humphreys v. Hollis*, Jac. 73.

(1) See *Meth. Epis. Church v. Jaques*, 3 John. Ch. 77.

18. In a late case (*y*), Lord Eldon seemed to be of opinion that if this alarming doctrine were perfectly *res integra*, he should hesitate before he would hold the husband bound to procure the wife to join. He said, that if a man chooses to contract for the estate of a married woman, he knows the property is hers. The purchaser is bound to regard the policy of the law; and what right *has he to complain, if she who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus penitentie*: and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, he added, that there was difficulty enough to make him pause, before he should follow the last two authorities; and he was not sure, whether it was not proper to have the judgment of the House of Lords, to determine which of the decisions on this point ought to bind us.

19. And it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised (I), and that equity will eagerly seize on any reasonable ground as a bar to the aid of the Court (*z*).—Indeed in a late case (*a*) in the Court of Common Pleas, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could not procure her concurrence, the learned Chief Justice said, that the covenant upon which the action was brought was such as the Court of Chancery would not now enforce; and he added, that nothing could be more absurd than to allow a married woman to be compelled to levy a fine, through the fear of her husband being sued and thrown into gaol, when the general principle of the law is, that a married woman shall not be compelled to levy a fine. This observation of Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, *in every case*, refuse to compel the husband to procure his wife's concurrence. The substitution for recoveries act (*b*), although it alters the mode of conveyance by a married woman, does not interfere with the rule in equity on this head (1).

(*y*) *Emery v. Wase*, 8 Ves. jun. 505; and see 16 Ves. jun. 367; *Howell v. George*, 1 Madd. 1.

(*z*) See *Ortread v. Round*, 4 Vin. Abr. 203, pl. 4; *Emery v. Wase*, *ubi sup.*; *Daniel v. Adams*, Amb. 495.

(*a*) *Davies v. Jones*, 1 New Rep. 267; and see *Martin v. Mitchell*, 2 Jac. & Walk. 425.

(*b*) 3 & 4 Will. 4, c. 74, s. 77, *post*, ch. 11, s. 4.

(1) Upon this expression Lord Eldon observed, that certainly it was very satisfactory to be informed, that it is, and not to be done. 8 Ves. jun. 516.

(1) See 2 Story Eq. Jur. §731 to §735; 2 Kent (6th ed.) 169; *Jane Hunter*, 1

20. An agreement by a married woman having separate estate for the *purchase* of property, has been enforced against the seller, upon the ground that she may contract as if she were a feme sole for the purchase of an estate, and that her separate property will be bound by the contract although she do not refer to it (c).

21. But in a case (d) before Sir John Leach, where the contract was entered into by a married woman (living separately from her *husband, and having a separate estate at her own disposal vested in trustees), to purchase a real estate, the contract was in her own name, and described her as the wife of J. Platt, living separate from her husband, and having a separate estate vested in trustees for her sole and separate use. A deposit was paid, and possession delivered to a servant of the lady's, but she by her answer denied that she had authorized possession to be taken, or had exercised acts of ownership. The bill was filed against the lady, and her husband, and her trustees, and prayed that her personal estate might be declared liable to make good the purchase-money. The answer raised the point of liability. The title was referred to the Master without prejudice to the question of liability. An action had been brought for the recovery of the deposit in the name of the husband, and Sir John Leach, although the Master reported in favor of the title, dismissed the bill without costs, on the ground that a married woman could not by a general engagement bind specifically her separate estate, although she could by an informal instrument, as a bond or note.

22. An agreement by a lunatic cannot of course be carried into a specific execution ; but the change of the condition of a person entering into an agreement by becoming lunatic, will not alter the right of the parties ; which will be the same as before, provided they can come at the remedy (1). As if the legal estate is vested in trustees, a court of equity will decree a specific performance ; and the act of God will not change the right of the parties ; but where the legal estate was vested in the lunatic himself, that would formerly have prevented the remedy in equity, and left it at law (e) ;

(c) Dowling v. Maguire, Llo. & Goo., A. 1829, p. 1770 ; see pl. 15, *supra*.
t. Plunket, 1.

(e) Owen v. Davies, 1 Ves. 82.

(d) Chester v. Platt, Rolls, Leg. Lib.

Edwards, 1. In Weed v. Terry, 2 Doug. 344, it was held that equity will not compel a specific performance, by a husband, of his agreement to procure his wife to join him in the conveyance of real estate. See also Edington v. Harper, 3 J. J. Marsh. 360.

(1) See Swartwout v. Burr, 1 Barbour, 495.

unless the purchaser was satisfied with the enjoyment of the estate which a decree would give him, and chose to encounter the inconvenience of leaving the legal estate outstanding in the lunatic, in which case a specific performance would have been decreed in his favor (*f*). But this anomaly is now removed by the 1 Will. 4, c. 65 (*g*), which provides, that where any person has contracted to sell an estate, and afterwards becomes lunatic, and a specific performance of such contract, either wholly or so far as the same remains to be performed, has been decreed either before or after such lunacy, it shall be lawful for the committee, by the direction of the Lord Chancellor, to convey in pursuance of such decree, and the purchase-money, or so much as remains unpaid, is to be paid to the committee.

23. If trustees, under a power of sale, make a legal contract for *sale of the estate, the contract binds the estate; and though, by the deaths of parties, the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power (*h*).

24. If an infant enter into a contract for the sale or purchase of an estate, he cannot enforce it in equity, for the remedy is not mutual (*i*) (1).

25. But although an infant cannot be compelled to complete a contract for the purchase of a property, yet if he contract for an estate, and pay a deposit, he cannot in the absence of fraud recover it back because he declines to complete the purchase. But if he

(*f*) Hall v. Warren, 9 Ves. jun. 605. 292; and see Shannon v. Bradstreet, 1

(*g*) Sec. 27. Scho. & Lef. 52.

(*h*) Mortlock v. Buller, 10 Ves. jun. (*i*) Flight v. Bolland, 4 Russ. 298.

(1) See Benedict v. Lynch, 1 John. Ch. 373; Boucher v. Vanbuskirk, 2 A. K. Marsh. 346. But it is laid down, as a general rule, that infancy is a personal privilege, of which no one can take advantage but the infant himself. Chitty Contr. (8th Am. ed.) 148 and cases cited in note (1); and, that, therefore, although the contract of the infant be voidable, it shall bind the other party, *ib.* note (2); for being an indulgence which the law allows to infants, to protect and secure them from the fraud and imposition of others, it can be intended for their benefit only, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. Were it otherwise, this privilege, instead of being an advantage to the infant, might in many cases turn greatly to his detriment. *ib.* Therefore an infant may sue an adult for a breach of promise of marriage, although the latter could not sue the former on such a promise. *ib.*; Hunt v. Peak, 5 Cowen, 475; Willard v. Stone, 7 Cowen, 22; Cannon v. Alsbury, 1 Marsh. 78. And where a minor by himself, and his guardian, agreed to let a farm to the defendant, which he refused to hold when the minor came of age, upon the ground that the latter was under age at the time of the contract, it was decreed in equity, that the defendant should take a lease, and should pay all costs. *ib.*

could show that fraud had been practised upon him, it would be otherwise (*k*).

26. Secondly, We are to consider the rules by which equity is guided in granting a specific performance, with reference to the agreement itself.

27. We shall, in the subsequent chapters of this treatise, have occasion to consider rather at large in what cases equity will or will not enforce a specific performance of an agreement for sale of an estate; and it will in this place, therefore, be sufficient to state the *general* rules by which equity is guided in compelling the specific performance of agreements.

28. The original foundation of these decrees was simply this, that damages at law would not give the party the compensation to which he was entitled; that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed. On this ground the Court, in a variety of cases, has refused to interfere, where from the nature of the case the damages must necessarily be commensurate to the injury sustained (*l*) (1), as, for instance, in agreements for the purchase of stock, it being the same thing to the party, where or from whom the stock is purchased, provided he receives the money that will purchase it; and the Court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law (*m*). But the sale of an annuity payable out of dividends of a particular stock (*n*), or of the

(*k*) *Wilson v. Keane*, Peake's Add. Cas. 196.

(*l*) *Errington v. Annesley*, 2 Bro. C. Ca. 341; *Flint v. Brandon*, 8 Ves. jun. 163; *Mitf. Pl.* 109. [*Cuddee v. Rutter*, Reported, 5 Vin. Abr. 538, Pl. 21; *White Lead*. Cas. in Equity, (Am. ed.) 520 et seq.]

(*m*) *Green v. Smith*, 1 Atk. 572; [*Sears v. Boston*, 16 Pick. 358; *Woodward v. Harris*, 2 Barbour Sup. Ct. R. 439.]

(*n*) *Withy v. Cottle*, 1 Sim. & Stu. 174, affirmed upon the hearing; 1 Turn. 78.

(1) *Sears v. Boston*, 16 Pick. 357; *Hatch v. Cobb*, 4 John. Ch. 559; *Kempshall v. Stone*, 5 John. Ch. 193; *Hepburn v. Dunlap*, 1 Wheaton, 197; *Hepburn v. Auld*, 6 Cranch, 262; *Savery v. Spence*, 13 Alabama, 561. The ground of the jurisdiction of courts of equity in such cases, is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Wherever, therefore, the party wants the thing in *specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. 1 Fonbl. Eq. B. 1, Ch. 1, §5, note (o); *Harnett v. Fielding*, 2 Scho. & Lef. 553; *Errington v. Annesley*, 2 Brown C. C. (Perkins's ed.) 341—343 and notes; *Madison v. Chinn*, 3 J. J. Marsh. 231; *Cathcart v. Robinson*, 5 Peters, 264; 2 Story Eq. Jur. §716; *Sears v. Boston*, 16 Pick. 357. The jurisdiction of courts of equity to decree specific performance may be distinctly traced back to the reign of Edward IV. 8 Ed. IV., 4, b; *Fonbl. Eq. B. 1*, Ch. 1, §5, in note; 2 Story Eq. Jur. §716; *Moseley v. Virgin*, 3 Sumner's Vesey, 184, note.

right to a dividend upon a bankrupt's estate (o), or even a contract *for stock where the object is to obtain delivery of certificates which confer the legal title to it (p), may be enforced in equity (1). These cases show what were the grounds on which courts of equity first interfered, but they have constantly held that the party who comes into equity for a specific performance, must come with perfect propriety of conduct, otherwise they will leave him to his remedy at law (q).

29. The decreeing a specific performance is a matter of discretion, but it is not an arbitrary, capricious discretion; it must be regulated upon grounds that will make it judicial (r) (2), and the period at which the Court is to examine the agreement between the parties, is the time when they contracted (s). And undoubtedly every agreement, of which there should be a specific execution, ought to be in writing, certain, and fair in all its parts (3); and for adequate

(o) *Adderley v. Dixon*, 1 Sim. & Stu. 18 Ves. jun. 10; [2 Story Eq. Jur. §750.] 607.

(p) *Doloret v. Rothschild*, 1 Sim. & Stu. 590. [*Duncuft v. Albrecht*, 12 Sim. 189; *Shaw v. Fisher*, 12 Jur. 152.]

(q) *Harnett v. Yielding*, 2 Scho. & Lef. 553; [misprinted in the book] *per Lord Redesdale*; and see *Cadman v. Horner*, 18 Ves. jun. 10; [2 Story Eq. Jur. §750.] (r) *Per Lord Eldon*, see 7 Ves. jun. 35; and see 1 Atk. 183; 4 Burr. 2539; *Davis v. Symonds*, 1 Cox, 402.

(s) *Revell v. Hussey*, 2 Ball & Beat. 288; *Ellard v. Lord Llandaff*, 1 Ball & Beat. 241. [*Moore v. Fitz Randolph*, 6 Leigh, 175.]

(1) 2 Story Eq. Jur. §717a, §718. The true rule in equity is, that a specific performance of an agreement relating to chattels ought to be decreed, when equity and conscience require it; as in case of pictures and other things of peculiar value and attachment, and when the remedy by action at law for damages would be inadequate, and no competent or just relief could be otherwise afforded. 2 Kent (6th ed.) 487, note; *Sarter v. Gordon*, 2 Hill Ch. 126, 127; *Young v. Burton*, 1 M'Mullan, (S. Car.) 255; *Clark v. Flint*, 22 Pick. 231. In this last case of *Clark v. Flint*, *Wilde J.* said:—"The reasons given for a distinction between real and personal estate are not very satisfactory. All, as it seems to me, that can be fairly inferred from the cases on this point is, that, in contracts respecting personal estate, a compensation in damages is much oftener a complete and satisfactory remedy, than it is in those which relate to real estate. But in all cases, if a party has not such a remedy, a court of equity will entertain jurisdiction, and grant relief as justice may require." See *Cowles v. Whitman*, 10 Conn. 121, 125; *Murphy v. Clark*, 1 Smedes & Marsh. 221, 232; *Butler v. Hicks*, 11 Smedes & Marsh. 79, 85; *Mechanics Bank of Alexandria v. Seton*, 1 Peters (S. C.) 309, 305; *Chamberlain v. Blue*, 6 Blackf. 491, 492; *Brown v. Gilliland*, 3 Desaus. 539, 541; *Hoy v. Hansborough*, 1 Freeman Ch. 533; 2 Story Eq. Jur. §717; *Sanquirico v. Benedetti*, 1 Barbour, 315; *Stuyvesant v. Mayor, &c. of N. York*, 11 Paige, 414; *Phillips v. Berger*, 2 Barbour Sup. Ct. Rep. 608.

(2) *St. John v. Benedict*, 6 John. Ch. 117; *Seymour v. Delancey*, 6 John. Ch. 225; S. C. 3 Cowen, 445; *Perkins v. Wright*, 3 Har. & M'Hen. 326; *Simmons v. Hill*, 4 Har. & M'Hen. 258; *Clitherall v. Ogilvie*, 1 Desaus. 257; *Jenkins v. Hogg*, 2 Const. Rep. (S. Car.) 841; *Hester v. Hooker*, 7 Smedes & Marsh. 768; *Tobey v. Bristol*, 3 Story C. C. 800; *Clement v. Reid*, 9 Smedes & Marsh. 535; *Wedgewood v. Adams*, 6 Bevan, 606.

(3) *Kendall v. Almy*, 2 Sumner, 278; *Carr v. Duval*, 14 Peters, 77; *German v. Machin*, 6 Paige, 288; *Seymour v. Delancey*, 6 John. Ch. 225; S. C. 3 Cowen, 445; *Acker v. Phoenix*, 4 Paige, 305.

consideration (t) (1). The Court will never decree a specific performance, unless the case of the plaintiff is perfectly clear from circumvention and deceit (u) (2).

30. Therefore (x) where the purchaser was plaintiff, and was the seller's agent, a specific performance was refused, because he had represented to the seller that the houses had been injured by a flood, and would require between 40*l.* and 50*l.* to repair them, whereas 40*s.* would have repaired the damage. He was considered to have been guilty of a degree of misrepresentation operating to a certain though a small extent, and that misrepresentation disqualified him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. And in a later case (y), the Court observed, that there was no case where the Court had, when misrepresentation was the ground of a contract, decreed the specific performance of it, and nothing would be more dangerous than to entertain such a jurisdiction. The principle upon which performance of an agreement is compelled requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame; misrepresentation, even as to a small part only, prevents him from *applying to equity for relief. He must come with perfect propriety of conduct; if he does not, that alone is a sufficient answer to him (3).

31. And accordingly, where a person for whose life the property was held, was described to be a very healthy gentleman, and in another passage, a healthy gentleman, and the sellers had, shortly before the sale, insured the life at a sum exceeding the highest

(t) *Per* Lord Hardwicke, see 1 Ves. 279; and see 3 Atk. 386; *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 241; *Martin v. Mitchell*, 2 Jac. & Walk. 413; *Stanley v. Robinson*, 1 Russ. & Myl. 527.

(u) See 1 Cox, 407.

(x) *Cadman v. Horner*, 18 Ves. jun. 10.

(y) *Lord Clermont v. Tasburgh*, 1 Jac. & Walk. 112.

(1) *Seymour v. Delancey*, 6 John. Ch. 222; S. C. 3 Cowen, 445; *Cole v. Trecothick*, 9 Vesey (Sumner's ed.) 234; *Moth v. Atwood*, 5 ib. 845, in note.

(2) *Clement v. Reid*, 9 Smedes & Marsh. 535; *Miller v. Chetwood*, 1 Green Ch. 199; *Seymour v. Delancey*, 6 John. Ch. 225; S. C. 3 Cowen, 445; *Acker v. Phoenix*, 4 Paige, 305; *Nellis v. Clark*, 20 Wendell, 24; *Catheart v. Robinson*, 5 Peters, (S. C.) 264, 276.

(3) *Best v. Stow*, 2 Sandford Ch. 298; *Schmidt v. Livingston*, 3 Edwards, 213; *Benedict v. Lynch*, 1 John. Ch. 375, 379; *Rodman v. Zilley*, 1 Saxton (N. J.) Ch. 320; *Patterson v. Mertz*, 8 Watts, 374; *Livingston v. Peru Iron Co.* 2 Paige, 390; *Perkins v. M'Garvoek*, Cooke, 417; *King v. Morford*, 1 Saxton (N. J.) Ch. 274; *Catheart v. Robinson*, 5 Peters (S. C.) 264, 276; *Fisher v. Worrall*, 5 Watts & Serg. 478; *Gurley v. Hiteshue*, 5 Gill, 217; *Young v. Frost*, 5 Gill, 287, 313.

rate charged for a healthy life of the same age, the bill of the sellers for a specific performance was dismissed with costs (z).

32. But, as we have seen, general statements by a seller may not amount to a misrepresentation—as in the case before quoted, where the fine for renewal was stated to be a small one, and that the estate was nearly equal to freehold, and those representations were considered to be indefinite. Such representations ought to put a purchaser upon inquiry. But if the seller knew that a larger fine would be required, and that the purchaser entertained a different idea of the fine, that would be a ground for rescinding the contract. Where the purchaser wished to ascertain the fine, and offered 150*l.* towards it, if the seller would pay the remainder, which he refused to do, the Court said that they could not put the purchaser in the situation in which he would have been, if the 150*l.* had been accepted. That circumstance (the refusal to pay beyond the 150*l.*) ought to have put him upon inquiry, and he did not bring himself within any rule to avoid the contract; and if he had, he could only have rescinded the contract (a).

33. A court of equity does not affect to weigh the actual value, nor to insist upon an equivalent in contracts, where each party has equal competence. When undue advantage is taken, it will not enforce the contract; but it cannot listen to one party, saying, that another man would have given him more money or better terms than he agreed to take. It may be an improvident contract; but improvidence or inadequacy do not determine a court of equity against decreeing specific performance (b) (1).

34. Equity will not decree a specific performance of an agreement made in a state of intoxication, although the party was not drawn in to drink by the plaintiff; nor will it decree the agreement to be delivered up; but will leave the parties to their remedy at law (c) (2).

(z) Brealey v. Collins, You. 317.

(a) Fenton v. Browne, 14 Ves. jun. 144. See Lowndes v. Lane, 2 Cox, 363.

(b) Sullivan v. Jacob, 1 Moll. 477; per Hart, L. C.

(c) Cragg v. Holme, 18 Ves. jun. 14,

cited. [Sumner's ed. note (a).] See Say v. Barwick, 1 Ves. & Bea. 95; Lightfoot v. Heron, 3 You. & Coll. 586; Nagle v. Baylor, 3 Dru. & War. 60.

(1) Coles v. Trecothick, 9 Vesey (Sumner's ed.) 234 and note; Moth v. Atwood, 5 ib. 845 and note; 1 Story Eq. Jur. §245, §246; Seymour v. Delancey, 6 John. Ch. 225, 232; S. C. 3 Cowen, 445; Minturn v. Seymour, 4 John. Ch. 500; Woodcock v. Bennett, 1 Cowen, 733; Cathcart v. Robinson, 5 Peters (S. C.) 264.

(2) See 1 Story Eq. Jur. §230, §231; Campbell v. Ketcham, 1 Bibb, 406; White v. Cox, 3 Hayw. 82; Wigglesworth v. Steers, 1 Hen. & Munf. 70; Taylor v. Patrick, 1 Bibb, 168; Rutherford v. Ruff, 4 Desaus. 350; Barrett v. Buxton, 2 Aiken, 167; Morrison v. McLeod, 2 Dev. & Bat. 221; Hutchinson v. Brown, 1 Clarke, 408; Ford v. Hitchcock, 8 Ohio, 214; Conant v. Jackson, 16 Vermont, 335; Prentice v. Achorn, 2 Paige, 30.

35. If it be stipulated in a contract, that immediate possession shall be given to the purchaser, which is done, but in consequence *of disputes as to the title, the seller afterwards turn the purchaser out of possession, he abandons his right to a specific performance (d) (1).

36. A court of equity frequently decrees a specific performance where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding conscientious that that agreement should be performed, as in cases where the terms of the agreement have not been strictly performed on the part of the person seeking specific performance; and to sustain an action at law, performance must be averred according to the very terms of the contract. Nothing but specific execution of the contract, so far as it can be executed, will do justice in such a case (e) (2).

37. Although damages may be recovered at law, yet equity is not therefore obliged to decree a specific performance; but the Court will judge on the whole circumstances of the case, whether it be such an agreement as ought to be carried into effect; for a jury, upon inquiry, may find very small damages, and then it would be very hard to carry such an agreement into execution in equity, when it would be greatly to the prejudice of the party against whom it should be decreed to be executed (f) (3).

38. Thus in a case where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxi-

(d) *Knatchbull v. Gruber*, 8 Mer. 124. *Pope v. Harris*, Lofft, 791, cited; *White's*

(e) *Davis v. Hone*, 2 Scho. & Lef. 341, case, 3 Swanst. 108, n.; *Coote v. Coote*, 748. See *Lennon v. Napper*, *ibid.* 684. 1 Sauss. & Scul. 693.

(f) *Per* Lord Hardwicke, MS. See

(1) Where a purchaser of land was let into possession, and paid a part of the purchase money, under the contract, but being sued by the vendor for the balance of the purchase money, he defended on the ground that the contract was void by the statute of frauds, and so defeated the action, it was held, that the purchaser after disaffirming and abandoning the contract, was not entitled to a specific execution thereof in equity. *Payne v. Graves*, 5 Leigh, 561.

(2) See 2 Story Eq. Jur. §775; Fonbl. Eq. B. 1, Ch. 6, §2 note (c); *Winne v. Reynolds*, 6 Paige, 407; *Taylor v. Longworthy*, 14 Peters, 173; *Perkins v. Wright*, 3 Har. & M'Hen. 326; *Clitherall v. Ogilvie*, 1 Desaus. 263; *Edwards v. Handley*, Hardin, 102; *Voorhees v. DeMeyer*, 2 Barbour, Sup. Ct. 37; *Lewis v. Woods*, 4 Howard, (Miss.) 86; *Tevis v. Richardson*, 7 Monroe, 656.

(3) See *Sears v. Boston*, 16 Pick. 357; *Ellis v. Burden*, 1 Alabama (N. S.) 458; *Perkins v. Wright*, 3 Har. & M'Hen. 326; *Hall v. Ross*, 3 Hayw. 202; *Perkins v. Hadley*, 4 ib. 143.

cated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held, that without the other circumstance, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the Court not to interfere, but leave them to law (*g*).

39. Nor will equity interpose, if the party who is called upon to do the act is not lawfully competent to do it; for that, amongst other inconveniences, would expose him to a new action for damages (*h*) (1).

*40. But although a covenant ought not to be performed literally, yet equity will execute it according to a conscientious modification of it, to do justice as far as circumstances will permit (*i*) (2).

41. *Prima facie*, a man who agrees to take an under-lease must know that he is bound by all the covenants contained in the original lease, and therefore, such a purchaser cannot object to usual covenants. And as it is his duty to inform himself of the covenants contained in the original lease, if he enters and takes possession of the property, he may be bound by even unusual covenants. And if the deeds are brought to his solicitor for inspection before the contract, who does, or might inspect them, he will be considered to have purchased with notice of the covenants (*k*). But although a man knows that the seller is only a lessee, yet if the agreement contains stipulations, the purchaser may rely upon them, because such an agreement amounts to a representation that the seller is not prevented from granting such terms, and if they are contrary to the covenants in the original lease, the purchaser is not bound (*l*). So if the purchaser state the object which he has in purchasing, and the seller is silent as to a covenant in the lease prohibiting that object, his silence

(*g*) *Fain v. Brown*, 2 Ves. 307, cited; *Costigan v. Hastler*, 2 Scho. & Lef. 160. See 2 Ball & Beatty, 283; *Howell v. George*, 1 Madd. 1; *Wedgwood v. Adams*, 6 Beav. 600.

(*h*) *Harnett v. Yielding*, 2 Scho. & Lef. 554; *Ellard v. Lord Llandaff*, 1

Ball & Beatty, 241. See *post*, p. 242.

(*i*) *Davis v. Hone*, 2 Scho. & Lef. 348.

(*k*) *Cosser v. Collinge*, 3 Myl. & Kee. 283; *Flight v. Barton*, *ib.* 282; *Proper v. Parker*, *ib.* 280.

(*l*) *Van v. Corpe*, 3 Myl. & Kee. 269.

(1) Equity will not help a party in the performance of an agreement made on purpose to defraud creditors. *St John v. Benedict*, 6 John. Ch. 111; *Herrick v. Grew*, 5 Wendell, 579. See *M'Dermid v. McCarland*, Hardin, 18; *Hannay v. Eve*, 3 Cranch, 242.

(2) See *Champion v. Brown*, 6 John. Ch. 398; *Ramsay v. Brailsford*, 2 Desaus. 583.

would be equivalent to a representation that there was no such prohibitory covenant; and it is unimportant that the seller was not aware of the extent or operation of the covenant (*m*).

42. *Suppressio veri*, as well as *suggestio falsi*, is a ground to rescind an agreement, or at least not to carry it into execution (*n*) (1), and even an industrious concealment, during a treaty, of the necessary repair of a wall to protect the estate from a river, which was a considerable outgoing, has been deemed a sufficient ground to withhold the aid of equity from a vendor (*o*).

43. So where there is a mistake between the parties as to what was sold, the Court will not interfere in favor of either party (*p*) (2). And it will not carry an agreement into effect where, by the death of a party, which was unknown to both seller and purchaser, the seller had a greater interest than was supposed, although he *sold all his present and future interest (*q*). And if a man, being employed to bid for an estate to prevent its being sold at an under-value, by mistake buy another estate belonging to another person previously put up on the same day and place, by the same auctioneer, the Court will not compel him to complete the purchase, but will leave the seller to his action for damages (*r*).

44. Even mere surprise on third persons at a sale by auction, has been deemed sufficient to prevent the Court from assisting a purchaser (3); as where the known agent of the seller bid for the estate on behalf of the purchaser, and other persons present, thinking he was bidding as a puffer on the part of the vendor, were deterred from bidding (*s*). So, in a recent case, where a purchaser, previously to the sale by auction, told the vendor that he would have nothing to do with the estate, but afterwards went to the

(*m*) *Flight v. Barton*, 3 Myl. & Kee. 282.

(*n*) See *Buxton v. Cooper*, 3 Atk. 383; S. C. MS.; *Howard v. Hopkins*, 2 Atk. 371; *Young v. Clerk*, Prec. Cha. 138; 1 Trea. Eq. ch. ii. s. 8; 1 Ball & Beatty, 241; *Lord Clermont v. Tasburgh*, 1 Jac. & Walk. 112.

(*o*) *Shirley v. Stratton*, 1 Bro. C. C. 440 [Perkins's ed. notes.] See *Small v. Atwood*, 6 Cla. & Fin. 232.

(*p*) See 1 Ves. jun. 211; 6 Ves. jun. 339; 13 Ves. jun. 427; *Higginson v.*

Clowes, 15 Ves. jun. 156; *Clowes v. Higginson*, 1 Ves. & Bea. 524; *Harnett v. Yielding*, 2 Scho. & Lef. 554; *Neap v. Abbott*, C. Coop. 333.

(*q*) *Colyer v. Clay*, 7 Beav. 188; consider the extent of the relief.

(*r*) *Malins v. Freeman*, 2 Kee. 25.

(*s*) *Twining v. Morris*, 2 Bro. C. C. 326. [Perkins's ed. notes.] See 6 Ves. jun. 338; 10 Ves. jun. 305, 313, 398; and see *Willan v. Willan*, 16 Ves. jun. 72; *Magrane v. Archbold*, 1 Dow. 107.

(1) *Warner v. Daniels*, 1 Wood. & Minot, 90, 108; *Torrey v. Buck*, 1 Green Ch. 367; *Waters v. Mattingley*, 1 Bibb, 244; *Livingston v. Peru Iron Co.* 2 Paige, 390.

(2) See *Greene v. Bateman*, 2 Wood. & Minot, 359.

(3) See *Mortlock v. Buller*, 10 Vesey (Sumner's ed.) 292 and note (d).

sale, *where he was considered by the company as a puffer* (I), and bid 8,000*l.* for the estate, which was knocked down to him at that sum from the misapprehension of the person appointed to bid for the vendor, who ought to have bid 9,000*l.*, and the mistake was instantly explained, a specific performance was refused (*t*).

45. If the contract be founded on fraudulent misrepresentations, such as would in a court of law be sufficient to support an action on the case, it may in a court of equity be rescinded. The fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party, and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted; and in such a case equity would rescind the contract (*u*).

46. If an agent, employed to sell an estate, sell it in a manner not authorized by the authority given to him, a specific performance will not be decreed against the principal, although the estate be sold for a greater price than he required for it (*v*). At least, *it is clearly settled, that if an agent is empowered to sell an estate by public auction, a sale by private contract is not within his authority. For although the owner may have fixed the price, yet the estate might have sold for more at a public auction. But if an agent is directed to sell an estate by private contract, and he dispose of it by public auction for a larger sum than the principal required, it still seems open to contend that the purchaser may enforce a specific performance of the contract, unless some particular reason should occur to induce the Court to refuse its aid.

47. In *Mortlock v. Buller* (*x*), Lord Eldon said he should hesitate long before he should state as a clear proposition, that where the title to a specific performance is founded in a gross breach of trust by an agent to his principal, a court of equity would assist the plaintiff in the purpose of availing himself of that breach of trust; and whether the principal would not authorize the Court to leave him to law, and not to let him come for a remedy beyond that. There were, he added, *dicta* enough well to authorize that.

(*t*) *Mason v. Armitage*, 13 Ves. jun. 25. See *Hill v. Buckley*, 17 Ves. jun. 394.

(*u*) *Lovell v. Hicks*, 2 You. & Coll. 46; vide *infra*, s. 4.

(*v*) *Daniel v. Adams*, Amb. 495; *et vide a dictum* by Lord Eldon in *Coles v. Trecothick*, 1 Smith's Rep. 247; *Hel-*

sham v. Langley, 1 You. & Coll. C. C. 175; *White v. Cuddon*, 8 Cla. & Fin. 766.

(*x*) 10 Ves. jun. 292; and see the close of the judgment, *Ord v. Noel*, 5 Madd. 438; *Bridger v. Rice*, 1 Jac. & Walk. 74; *Turner & Harvey, Jac.* 169; *Neale v. Mackenzie*, 1 Kee. 474.

(I) This is stated in the judgment, but *qu.* whether it appeared in evidence.

48. And where trustees for sale of an estate enter into a contract, which would be deemed a breach of trust, equity will not only refuse to interfere in favor of the purchaser, but will even at the suit of the *cestuis que trust* restrain the trustees from executing the contract, and the purchaser will be left to his remedy at law (y).

49. Where a power of sale is given to trustees, although to be executed at the request of the tenant for life, it is discretionary in them whether they will exercise the power, and therefore if they think it disadvantageous to their *cestuis que trust*, they cannot be compelled to adopt a contract entered into by the tenant for life for sale of the estate (z).

50. But if the tenant for life sell, it may be referred to the Master to inquire whether he can, by application to the trustees, procure a good title to be made (a).

51. If a person, entitled in default of execution of a power of sale, contract to sell the estate, not as owner, but merely as the agent of the trustees, and the contract could not, under the circumstances, have been carried into execution against the trustees, *it will not be enforced against the agent, although he himself become entitled to the estate before the decree (b), (I).

52. Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so; though the owner offer to make the seller a title, yet equity will not force the buyer to take it, for every seller ought to be a *bona fide* contractor (c): and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides,

(y) *Mortlock v. Buller*, 10 Ves. jun. 292. See *Hill v. Buckley*, 17 Ves. jun. 394; *Bridger v. Rice*, 1 Jac. & Walk. 74; *Wood v. Richardson*, 4 Beav. 174; *Thompson v. Blackstone*, 6 Beav. 470.

(z) *Thomas v. Dering*, 1 Kee. 729; vide *supra*, ch. 2.

(a) *Graham v. Oliver*, 3 Beav. 124.

(b) *Mortlock v. Buller*, 10 Ves. jun. 292.

(c) *Tendring v. London*, 2 Eq. Ca. Abr. 680, pl. 9. See 10 Ves. jun. 315; and 1 Jac. & Walk. 421; and *query*, whether there is *any* case, in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the report. See *Bryan v. Lewis*, 1 Mood. & Ry. 386.

(I) From the papers in this cause, it seems that Mr. Buller treated with Mr. Mortlock as the owner of the estate, and this appeared from the receipt for the purchase-money, where the estate was called, "the property of John Buller, Esq.," and Mr. Mortlock had not any knowledge whatever that the estate was in settlement. See *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

Since this note was written, an action brought by Mr. Mortlock against Mr. Buller, for breach of contract, came on for trial, when it was compromised on terms very advantageous to the plaintiff. See 2 Ball & Beatty, 60; and see 2 Dow, 518.

the remedy is not mutual, which perhaps is of itself a sufficient objection in a case of this nature. In *Armiger v. Clarke (d)*, a tenant for life contracted to sell the inheritance; after his death, his son who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual. And in *Noel v. Hoy (e)*, it was said, that if *A* sells *B*'s estate, although *B* is willing to confirm the contract, *A* cannot enforce it: there is no mutuality. So an infant cannot specifically enforce a contract by himself for sale, because there is no mutuality (*f*). But in *Williams v. Carter (g)*, the estate was sold, and it was afterwards discovered that it was bound by marriage articles, which it was decided in a suit instituted for the purpose, authorized the introduction of a power of sale in the trustees, and thereupon a bill was filed by them and the seller for a specific performance. The Vice-Chancellor overruled the objection, that there was no mutuality in the agreement, and decreed a specific performance.

*53. But of course the rule does not apply to a seller in possession, where it turns out that he has not a title to a small part; he may purchase the part, and make good his own sale (*h*); or where, although there is a power to impeach his title to the whole estate, he obtains a release of the adverse right before the purchaser is entitled to be released (*i*)(1).

54. On the other hand, where a *bona fide* vendor has not a title to the estate, the Court will leave the purchaser to his remedy upon the articles at law (*k*), where in most cases he would obtain nominal damages only (*l*). But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so (*m*).

55. But where a tenant for life with a power of sale, first settling other estates of equal or better value, sold the estate under

(d) Bunb. 111; see *post*, ch. 7; *Hamilton v. Grant*, 3 Dow, 33.

(e) V. C. 23 Feb. 1820, MS.

(f) *Flight v. Bolland*, 4 Russ. 298.

(g) MS. V. C. 1821; *London and Birmingham Railway Company v. Winter*, 1 Cra. & Phil. 57; see *Adams v. Broke*, 1 You. & Coll. C. C. 627; *Salisbury v. Hatcher*, 2 You. & Coll. C. C. 54.

(h) *Chamberlain v. Lee*, 10 Sim. 444.

(i) *Eyston v. Symonds*, 1 You. & Coll.

C. C. 608.

(k) *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; *Cornwall v. Williams, Colles*, P. C. 390; *Benet College v. Carey*, 3 Bro. C. C. 390.

(l) *Fleureau v. Thornhill*, 2 Blackst. 1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364. *Vide post*.

(m) See *Harnett v. Yielding*, 2 Scho. & Lef. 549; and *post*, ch. 10.

(1) See *Voorhees v. De Meyer*, 2 Barbour Sup. Ct. 37; *McKay v. Carrington*, 1 McLean, 64.

an apprehension that he had power to convey the fee, the Court refused to compel him to settle another estate, in order to enable him to complete his contract (*n*).

56. To enable the Court to decree a specific performance against a vendor, it is not, however, necessary that he should have the legal estate; for if he has an equitable title, a performance in specie will be decreed (*o*), and he must obtain the concurrence of the persons seised of the legal estate (*1*).

57. Although, as we have seen, a vendor cannot demand the aid of equity, unless he is a *bona fide* contractor, yet the circumstance that the purchaser is a nominal contractor, and purchases in trust for another person, is immaterial; for it happens, in a vast proportion of cases, that the contract is entered into in the name of a trustee (*p*), and the mere fact of a quarrel having taken place between the vendor and the real purchaser, totally unconnected with the subject of the contract (*q*), or even a bare refusal by the vendor to deal with the real contractor (*r*), is not a sufficient ground to refuse a performance in specie of the agreement.

58. But if a person apply to purchase an estate, and the vendor expressly refuse to treat with him, unless the money is paid down, which he is unable to do, but procures some other person to pur-

(*n*) Howell v. George, 1 Madd. 1.

(*q*) S. C.

(*o*) Crop v. Norton, 2 Atk. 74. See

(*r*) Lord Irnham v. Child, 1 Bro. C.

Costigan v. Hastler, 2 Scho. & Lef. 160. C. 92.

(*p*) Hall v. Warren, 9 Ves. jun. 605.

(1) Courts of Equity will not decree the specific performance of an agreement of sale, and oblige the purchaser to accept a title, which the vendor cannot make out to be clearly good and free from incumbrance. Butler v. O'Hear, 1 Desaus. 282; Lewis v. Herndon, 3 Litt. 358; Kelley v. Bradford, 3 Bibb, 317; Seymour v. Delancey, 1 Hopkins, 436; Young v. Lillard, 1 Marsh. 482; Morgan v. Morgan, 2 Wheaton, 290, 299; Reed v. Noe, 9 Yerger, 283; Watts v. Waddle, 6 Peters, 389; Hepburn v. Dunlap, 1 Wheaton, 179; Beckwith v. Kouns, 6 B. Monroe, 222; Winne v. Reynolds, 6 Paige, 407. It is sufficient, however, if the vendor is able to make out a good title before decree pronounced, although he had not a good title when the contract was made; Hepburn v. Auld, 5 Cranch, 262, 275; Finley v. Lynch, 3 Bibb, 566; Tyree v. Williams, 3 Bibb, 366; Seymour v. Delancey, 3 Cowen, 445; Pierce v. Nichols, 1 Paige, 244; Colton v. Ward, 3 Monroe, 304, 313; Baldwin v. Salter, 8 Paige, 473; Dutch Church, &c. v. Mott, 7 Paige, 78; unless there is material injury caused by the delay; Dutch Church, &c. v. Mott, 7 Paige, 78; Nodine v. Greenfield, 7 Paige, 544; or time is of the essence of the contract; Wells v. Smith, 7 Paige, 22; S. C. 2 Edwards, 78; Marquis of Hertford v. Boore, 5 Vesey, (Sumner's ed.) 719, in note. But equity will not relieve a purchaser, who had a full knowledge of the defect in the title; Craddock v. Shirley, 3 Marsh. 288; or if his conduct has amounted to a waiver of the objection; Roach v. Rutherford, 4 Desaus. 126. See Ramsay v. Brailsford, 2 Desaus. 590, 591. See farther on the subject of enforcing agreements in cases of doubtful and defective titles, Tomlin v. M'Chord, 5 J. J. Marsh. 136; Beale v. Seiveley, 8 Leigh, 658; Bryan v. Reed, 1 Dev. & Batt. Eq. 86; Watts v. Waddle, 1 M'Lean, 200; Cooper v. Denne, 4 Brown, C. C. (Perkins's ed.) 87, 88, & notes; Roake v. Kidd, 5 Sumner's Vesey, 647, note.

chase *the estate on his account, it seems clear, that at least the time appointed for payment of the money will be deemed of the very essence of the contract (*s*) (I). So if a person apply to purchase an estate on behalf of *A*, for whom the vendor has a great value or affection, and the vendor is induced to take less for the estate than he otherwise would have done; or even, perhaps, without this circumstance, the agreement cannot be enforced against the vendor, if it be made on behalf of any other person than *A*; but if *A* will patronise the sale, execution of the agreement must be compelled, although he may sell the estate the next day to the fraudulent purchaser (*t*) (II).

59. The case of *Scott v. Langstaffe* (*u*), was decided on the same principle. A purchaser of a house adjoining to a house *occupied by the vendor, agreed with the vendor, though it was not made part of the written contract, that he would not lease the

(*s*) *Popham v. Eyre*, Lofft. 786. Mr. Featherstonhaugh *v. Fenwick*, 17 Ves. jun. 298.
 Brown's note of this case evinces the danger of relying on short notes of cases; see 1 Bro. C. C. 95, n. See *O'Herlihy v. Hedges*, 1 Shoales & Lefroy's Rep. 123; but note, that case was between landlord and tenant; and see

(*t*) *Philips v. Duke of Buckingham*, 1 Vern. 227.

(*u*) Lofft, 797, 798, cited; and see *Bonnett v. Sadler*, 14 Ves. jun. 527; *Fellowes v. Lord Gwydyr*, 1 Sim. 63.

(I) The L. C. B. in delivering judgment in *Davis v. Symonds*, 1 Cox, 407, observed, that in *Eyre v. Popham* [according to the false report of it], it seemed as if concealing the name of a purchaser was a sufficient reason for not decreeing a performance; adding, however, we may doubt particular cases without shaking the principle [upon which the Court acts in refusing to interfere], which is clear.

(II) In Mr. Raithby's edition it is said that a specific performance was decreed. The principle, however, is now well established. In *Roger North's Life of the Lord Keeper* (vol. ii. p. 130, 131), he thus states the case:—

I may state another case, in which it appeared his Lordship's consideration of justice surmounted his will, which was always inclined to be good to those of his profession, especially if he had a real value and esteem for them. The Duke of Bucks was disposed to sell an estate in Leicestershire. It was while my Lord Nottingham had the great seal. His son Heneage, a celebrated orator in Chancery practice, had formerly bought of the duke an estate at Aldborough in Sussex: and not a few suits depended in court between his grace and his creditors and trustees, in which the contention ran high. Mr. Ambrose Philips, an eminent practiser in the court, sought to buy the Leicestershire estate of the Duke of Bucks, and contrived to use the name of Mr. Heneage Finch in the treaty. On the other side, it was told the duke that, if he let Mr. Finch have the purchase at an easy rate, it would be taken as a respect, and turn to an account in his causes. So the matter went on, and the purchase, by payment and sealing, finished. Then the duke found out he had been imposed on, and that Philips, and not Finch, was the real purchaser; which if he had known before, he would not have taken under 2,000*l.* more than the price he had received. He was so unsatisfied, that he brought a bill against Philips to be relieved as to this 2,000*l.*, and, by circumstances in the cause, it was plain to his lordship that the duke's price took in that 2,000*l.*, but that, for Mr. Finch's sake (or rather his father's), he had bated it; and also, that it was so pretended to him only to make him bate that sum; so that his lordship decreed Philips to pay that sum, over and above his purchase-money; which 2,000*l.* he had got off by a wily false pretence of Mr. Finch's being the purchaser.

house to any person not agreeable to him. Langstaffe applied for a lease, and stated that he knew the vendor intimately, and that there would be no objection to grant him a lease. The vendor, however, disapproved of Langstaffe, and, so far from knowing him intimately, had only seen him at a tavern. Lord Camden said, this was the case of *Philips v. the Duke of Buckingham*. Nobody, who had read that case, could easily forget it. And his Lordship set aside the agreement which Langstaffe had obtained, with costs.

60. A similar case is mentioned in Hawkins's life of Johnson, which was also decided on the authority of *Philips's* case. Peele the bookseller had a house near Garrick's at Hampton. Peele had often said, that as he knew it would be an accommodation to Garrick, he had given directions that at his decease he should have the refusal of it. On Peele's death, a man in the neighborhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's, who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs.

61. But although a seller falsely assume the character of an agent to another, when he is himself the real seller, and the purchaser be deceived by the representation, yet it has been decided that if the purchaser cannot prove damage, or that the misrepresentation induced him to enter into the contract, a specific performance will not be refused (*x*). But where a purchaser had a suspicion of the ownership of the subject offered for sale—a Claude—and the ownership, in his view, enhanced the price, and the seller's agent knowing that the purchaser labored under a deception, permitted him to remain in it, although the point was one which he thought material to influence his judgment, the contract was held to be void at law (*y*).

62. An agreement for the sale of an annuity for three lives, to be named by the purchaser, and to commence immediately, will be decreed, although the lives have not been named, if the delay has been occasioned by the seller (*z*).

*63. In some cases (*a*), it has been holden, that where no action

(*x*) *Fellowes v. Lord Gwydyr*, 1 Sim. 63; 1 Russ. & Myl. 83. See *Crosbie v. Tooke*, 1 Myl. & Kee, 431.

(*y*) *Hill v. Gray*, 1 Stark. Ca. 434; *Filmore v. Hood*, 5 Bing. N. C. 97.

(*z*) *Pritch'd v. Ovey*, 1 Jac. & Walk. 396.

(*a*) *The Marquis of Normanby v. Duke of Devonshire*, 2 Freem. 216; *Dr. Bettesworth v. Dean and Chapter of St. Paul's*, Sel. Cha. Ca. 66; and see 2 Eq. Ca. Abr. 15, 23, *notis*; and *Fonbl. n. (c)* to 1 Trea. Eq. 138, and *n. (h)* to p. 204, *ibid*.

at law will lie to recover damages, equity will not execute the agreement in *specie*; for equity will never make that a good agreement, which is not so by law (1); but in other cases (b), the contrary has been holden, and relief been given accordingly (2). Perhaps the following distinctions are authorized by the cases, and will reconcile them.

64. First, That although the agreement be void at law, yet a specific performance will be decreed, if there is a clear ground for the interference of equity, according to the general rules of the Court; and, however unqualifiedly the contrary rule may have been laid down, there is not (that I am aware of) any case clearly entitled to the aid of the Court, to which this rule has been successfully opposed as a bar to the relief.

65. Thus a bond from a woman to her intended husband has been enforced in equity, although void at law by the intermarriage; and an agreement for sale of an estate has been decreed against an heir at law, although his ancestor died before the time appointed to convey the estate, and therefore no action would lie against him. In the first of these cases the impropriety of the security was deemed immaterial; for it was sufficient that the bond was a written evidence of the agreement of the parties, and the agreement being upon a valuable consideration, ought to be executed in equity. The decision in the other case depended upon the doctrine, that the articles were a lien upon the land; the contract being a purchase in equity. But,

66. Secondly, Equity cannot contradict or overturn the grounds or principles of law (c); and therefore, in many cases, it must be considered whether damages could be recovered at law, and the Court will be guided by the result (d).

67. Thus agreements for sale of an estate have (as we have already seen) been decreed on mere letters which have passed between the parties, but not unless all the terms of the agreement were therein specified; and even this was going a great way. In the first case, therefore, in which even a trifling omission appeared

(b) *Winged v. Lefebury*, 2 Eq. C. 275; 1 Smith's Rep. 213. *Abt. 32*, pl. 43; *Acton v. Pierce*, 2 Vern. 480; *Cannel v. Buckle*, 2 P. Wms. 243; *v. Sherwin*, 10 Mod. 1. (c) See 2 P. Wms. 753; *Earl of Bath v. Norton v. Mascall*, 2 Vern. 24; and *Hall v. Hardy*, 3 P. Wms. 187. See *East India Company v. Donald*, 9 Ves. jun. 159. (d) See *Hollis v. Edwards*, 1 Vern.

(1) See *Tevis v. Richardson*, 7 Monroe, 656; *Hickman v. Grimes*, 1 A. K. Marsh. 87; *Smith v. Carney*, 1 Litt. 295.

(2) *Fonbl. Eq. B. 1*, Ch. 1, §5 note (o); *ib. B. 1*, Ch. 3, §1 note (c); 2 Story Eq. Jur. §738, §739.

in the letters, it was natural to pause before the performance of the *agreement was decreed, and to ascertain whether damages could be recovered at law; for the statute of frauds and perjuries must receive the same construction in a court of equity as in a court of law, unless in the case of fraud, &c. where equity interposes and relieves against the abuse, or allays the rigor of the law. The case of the Marquis of Normandy *v.* the Duke of Devonshire, was, I believe, the first in which this point occurred; and, according to a manuscript note, it appears that Lord Somers called in the two chief justices on the point, whether the party, on the letters which had passed, could have recovered damages at law? They were of opinion that he could not, and Lord Somers accordingly dismissed the bill.

68. So there are very few cases in which a court of equity can decree a performance of an agreement upon which there can be no action at law, *according to the words of the articles, and the events that have happened* (e).

69. A proviso, in a contract for sale, that if either party break the agreement he shall pay a sum of money to the other, will only be considered in the nature of a penalty (f) (I); and consequently a specific performance will be decreed just as if no such proviso had been inserted. The defendant will not be allowed to forfeit the penalty and get rid of the agreement (g) (1).

70. Where an action is brought for the recovery of the penalty, to entitle the party bringing it to recover, he ought punctually, exactly, and literally, to have completed his part (h). And it has been said, that if, for breach of an agreement, to which a penalty was annexed, either party recover damages at law beyond the penalty, equity will relieve against the verdict, on payment of the penalty only (i); but this is not well founded, for if the party have two remedies at law, one for breach of contract upon the covenant,

(e) *Whitmel v. Farrel*, 1 Ves. 256.

(f) *Howard v. Hopkins*, 2 Atk. 371. See 2 Scho. & Lef. 684; and *Magrane v. Archbold*, 1 Dow, 107; *Davies v. Penton*, 6 Barn. & Cress. 216, 9 Dowl. & Ry. 369.

(g) *Hopson v. Trevor*, 1 Str. 533; 2 P. Wms. 191; *Parks v. Wilson*, 10 Mod.

515; *Belchier v. Reynolds*, 2 Lord Keny. 2 part, 87.

(h) *Duke of St. Alban's v. Shore*, 1 H. Blackst. 270.

(i) *Shenton v. Jordan*, Bunb. 132; but the reporter adds a *query*, for this seems an extraordinary opinion.

(I) As to liquidated damages, vide *supra*, s. 2, pl. 21.

(1) *Gordon v. Brown*, 4 Iredell Eq. 399. See *Ayers v. Pease*, 12 Wendell, 393.

or agreement, *toties quoties* ; the other for the penalty at once (*k*), there appears to be no pretence for equity to relieve ; although where large damages have been recovered at law, under a covenant *which it was unconscientious strictly to enforce, the party may be relieved in equity, upon offering to perform the covenant according to conscience : but even this seems, in some measure, to be usurping the province of a jury, and the equity is administered with great caution (1).

71. Lastly, to enable equity to enforce a contract it must be enabled to specifically perform every part of it (*l*).

(*k*) See *Harrison v. Wright*, 13 East, 343.

(*l*) *Gervais v. Edwards*, 2 Dru. & War. 80.

(1) See 2 Story Eq. Jur. §1313 et seq. ; *Skinner v. Dayton*, 2 John. Ch. 526 ; Fonbl. Eq. B. 1, Ch. 3, §2, note (d) ; B. 1, ch. 6, §4, note (h) ; *Sloman v. Walter*, 1 Brown C. C. (Perkins's ed.) 418, 419 and notes.

SECTION IV.

OF THE REMEDIES FOR A BREACH OF CONTRACT.

I. The remedy in equity.

2. *Injunction to prevent injury.*
3. *Reference of title.*
5. *Purchase-money ordered into Court.*
7. *Where not.*
11. *Time allowed.*
12. *Seller ordered to pay in deposit.*
13. *Multifariousness.*
- 15, 16. *Receiver's agents not proper parties.*
17. *Nor Adverse claimants.*
18. *Mortgagee not a proper party.*
20. *Plaintiff proving different agreements.*
22. *Upon dismissal of bill, no account.*
23. *Damages to purchaser.*
26. *No compensation for defective title.*
27. *New defence by purchaser.*
29. *Seller cutting ornamental timber pending suit.*
30. *Bill for injunction and specific performance.*

II. The remedy at law.

31. *Action by purchaser for fraud after decree.*
32. *Party having waived, cannot bring action after decree.*
33. *Nor where bill dismissed for want of title.*
34. *Actions by parties after bill dismissed.*
35. *A second action not allowed.*
37. *Money had and received.*
42. *No damages for loss of bargain.*
44. *Loss by selling out of the funds.*
45. *Interest on deposit.*
46. *Expenses of investigating title.*
47. *Particulars of fact and law.*
51. *Averment of title : proof of title-deeds.*
52. *Extent of damages to seller.*
53. *Action by heir or executor of purchaser.*
54. *Delivery of agreement to be stamped.*

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| 55. <i>Agreement by letters, one stamp.</i> | <i>has re-sold.</i> |
| 56. <i>Mutual covenants.</i> | 68. <i>Purchaser let into possession not a</i> |
| 59. <i>Seller to execute conveyance before</i> | <i>tenant.</i> |
| <i>action.</i> | 69. <i>Ejectment against him.</i> |
| 61. <i>Purchaser to tender conveyance and</i> | 71. <i>Condition that purchaser shall be</i> |
| <i>purchase-money.</i> | <i>deemed tenant.</i> |
| 67. <i>Unless there is a bad title, or seller</i> | 73. <i>Ne exeat.</i> |

1. If either the vendor or vendee refuse to perform the contract, the other may bring an action for breach of contract, or file a bill *for a specific performance (a) ; although it appears to have been formerly thought that as a vendor only wants the purchase-money, his remedy was at law (b) (1).

I. As to the remedy in equity.

2. If a bill be filed for a specific performance, the Court will enjoin either party not to do any act to the injury of the other. Therefore, if the purchaser is in possession, and has not paid the money, the Court will grant an injunction against his cutting timber (c) (2), so, on the other hand, the vendor will be restrained from conveying away the legal estate in the property ; because such a measure might put the purchaser to the expense of making another party to the suit (d) (3), and *a fortiori*, he will be restrained from selling the estate to a third person (e). But in *Spiller v. Spiller* (f), the Lord Chancellor expressly laid it down, that upon a bill filed for a specific performance, he wished it to be understood, that the Court would not take from a seller the disposition of his property. So injunctions may be granted against the agents of the parties. But an injunction will not be granted against a

(a) *Lewis v. Lord Lechmere*, 10 Mod. 503.

(b) See *Armiger v. Clark*, Bunb. 111 ; *Withy v. Cottle*, 1 Sim. & Stu. 174. See *Kenney v. Wenham*, 6 Madd. 315.

(c) *Crockford v. Alexander*, 15 Ves. jun. 138.

(d) *Echcliff v. Baldwin*, 16 Ves. jun. 267.

(e) *Curtis v. Marquis of Buckingham*, 3 Ves. & Beam. 168 ; but see *Turner v. Wight*, 4 Beav. 40.

(f) 30 June 1819, MS. S. C. 2 Swanst. 556.

(1) 2 Story Eq. Jur. §723 ; *Cathcart v. Robinson*, 5 Peters (S. C.) 264, 278 ; *Brown v. Haff*, 5 Paige Ch. 235.

(2) See *Hanson v. Gardiner*, 7 Vesey (Sumner's ed.) 305 and notes ; 3 Daniell Ch. Pr. (Perkins's ed.) 1853, 1854 and notes. But it is said that such an injunction ought not to be granted, unless the vendor bring his suit to subject the land to the payment of the purchase money ; and unless he charge the defendant with committing waste in such manner as to render the land an incompetent security. *Scott v. Wharton*, 2 Hen. & Munf. 25.

(3) Daniell Ch. Pr. (Perkins's ed.) 1873.

person who is not a party to the suit ; and, in a late case, in which, upon a bill filed by a seller for a specific performance, and an injunction against the purchaser's proceeding at law to recover the deposit from the seller's attorney, to whom it was paid, Sir John Leach, V. C., refused the motion, with costs, because the attorney was not a party to the suit (*g*) (1). But in a later case, the same Judge granted an injunction to restrain the purchaser from proceeding in an action against the auctioneer, although he (the auctioneer) was not a party to the suit ; the seller offering to bring the deposit into Court. Pending a suit by a purchaser for a specific performance of an agreement to sell a presentation to a living, the seller may be restrained by injunction from presenting, and the Bishop from instituting, or in the case of a lapse from collating to the living any clerk not named by the purchaser (*h*).

3. In all cases where a bill in equity is filed for a specific performance, either party may in general, if he please, have a reference as to the title. The relief afforded in equity, where the question of specific performance depends upon the state of the title *will be fully considered in the chapter devoted to Title (*i*) ; but we may here observe, that where the purchaser files a bill, and insists that the vendor *cannot* make a good title, equity can only dismiss the bill with costs, although the Court will compel him to make out the title if he have the ability (*j*) (2).

4. We shall hereafter see that the title may be referred to the Master before the answer is put in, unless the purchaser's counsel can state that there are other objections (*k*) ; but in every case where the answer upon reasons solid or frivolous insists that the agreement ought not to be executed, the Court must first dispose of the question raised (*l*). If however by an untrue statement in the answer, the plaintiff is unable to obtain the usual reference on motion, the defendant will be ordered ultimately to pay the costs occasioned by such defence up to and inclusive of the hearing (*m*).

5. A new practice has sprung up, by which certainly some suits have been quickly disposed of, but which has been a surprise upon

(*g*) *Brown v. Frost*, E. T. 1818, MS.

(*h*) *Nicholson v. Knapp*, 9 Sim. 326. *post*, ch. 8 & 10.

(*i*) *Post*, ch. 10.

(*j*) *Nicloson v. Woodsworth*, 2

Swanst. 365 ; see ch. 8 & 10, *post*.

(*k*) *Matthews v. Danx*, 3 Madd. 470,

post, ch. 8 & 10.

(*l*) *Post*, ch. 8 & 10.

(*m*) *Hyde v. Dallaway*, 4 Beav. 606.

(1) 3 Daniell Ch. Pr. 1831 ; *Fellows v. Fellows*, 4 John. Ch. 25 ; *Waller v. Harris*, 7 Paige, 167.

(2) 3 Daniel Ch. Pr. (Perkins's ed.) 1548.

many parties. I allude to the practice of ordering a purchaser *in possession of the estate* upon motion to pay the purchase-money into Court. This, under special circumstances, has even been done before answer (*n*); but the purchaser has, in some cases, had the option to pay the money, or give up possession (*o*); in others, an occupation rent has been set, deducting interest on the deposit (*p*); and, in others, a receiver has been appointed (*q*); and payment of the money will be ordered, although by the agreement it is payable by installments, and a portion of it is to remain secured upon the estate (*r*).

6. This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good (*s*) where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted without effect to sell the estate (*t*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections (*u*)—where the purchaser had *been guilty of laches, and cut underwood (*v*). Even in a case where it appeared on the face of the abstract that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser (*x*). So where from circumstances an acceptance of the title was inferred (*y*)—again, where the time was fixed for payment of the purchase-money by installments, and the property was a *coal-mine* (*z*). In all these cases the rule has been applied, and if the estate be sold under a *decree*, and the purchaser enter into possession, he will be compelled to pay his purchase-money into court, unless he entered with the express consent of the *Court* (*a*).

7. But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an un-

(*n*) *Dixon v. Astley*, 1 Mer. 133. See *Burroughs v. Oakley*, 1 Mer. 52, 376; *Blackburn v. Stace*, 6 Madd. 69.

(*o*) *Clarke v. Wilson*, 15 Ves. 317; *Smith v. Lloyd*, 1 Madd. 83; *Morgan v. Shaw*, 2 Mer. 138; *Wickham v. Everest*, 4 Madd. 53.

(*p*) *Smith v. Jackson*, 1 Madd. 618; *Smith v. Lloyd*, 1 Madd. 83.

(*q*) *Hall v. Jenkinson*, 2 Ves. & Beam. 125. See *Clarke v. Elliot*, 1 Madd. 606.

(*r*) *Younge v. Duncombe*, You. 275.

(*s*) *Gibson v. Clarke*, 1 Ves. & Beam. 500. See 1 Madd. 607.

(*t*) *Hall v. Jenkinson*, 2 Ves. & Beam. 125.

(*u*) *Watson v. Upton*, Coop. 92, n. But see *Bonner v. Johnston*, 1 Mer. 366;

and see *Crutchley v. Jerningham*, 2 Mer. 502; *Fournier v. Edwards*, T. T. 1819, V. C. The deeds were executed, and an application was made for the completion of the purchase, but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*v*) *Burroughs v. Oakley*, 1 Mer. 52, 376; *Dixon v. Astley*, 1 Mer. 133, 378, n.; *Bradshaw v. Bradshaw*, 2 Mer. 492.

(*x*) *Brown v. Kelty*, L. I. Hall, July 1816, MS.

(*y*) *Boothby v. Walker*, 1 Madd. 197; and see *Smith v. Lloyd*, 1 Madd. 83.

(*z*) *Buck v. Lodge*, 18 Ves. jun. 450.

(*a*) *Anon.* L. I. Hall, 16 July 1816, MS.

derstanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into court in this summary way (*b*), nor can the payment be compelled where the vendor gives possession without stipulation (*c*), or the purchaser was in possession under another title before the contract (*d*) : or the possession was given independently of the contract, and the seller has been guilty of laches (*e*), although in such cases the purchaser may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees, or selling it to another person (*f*). But the purchaser after a long period will not be permitted to keep possession of the estate, and also withhold the purchase-money : if a title has not been made, he will be put to his election within a reasonable time, *e. g.* two months, to give up the possession or pay the purchase-money (*g*).

8. If an agreement be by parol for sale at so much an acre, and possession be given to the purchaser without any understanding respecting the period when the purchase-money should be paid, and the bill alleges a quantity of land to be sold, which is *denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into court (*h*).

9. Perhaps two simple rules may be deduced from the cases : 1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course.

10. But 2d, If the possession by the purchaser, without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber, by which the property is lessened in value, or selling the estate, by which the first seller's remedy is complicated without his assent ; in such cases, the Court will interpose and compel the purchaser to pay the purchase-money into court (1).

11. Where the sum is large, the Court has allowed a long day,

(*b*) *Gibson v. Clarke*, 1 Ves. & Beam. 500. (*b*) *Bramby v. Teal*, 3 Madd. 219; *Gill v. Watson*, *ibid.* 225.

(*c*) *Clarke v. Elliott*, 1 Madd. 606.

(*d*) *Freebody v. Perry*, Coop. 91; *Bonner v. Johnston*, 1 Mer. 366.

(*e*) *Fox v. Birch*, 1 Mer. 105.

(*f*) *Cutler v. Simmons*, 2 Mer. 103;

(*g*) *Tindal v. Cobham*, 2 My. & Kee. 385.

(*h*) *Benson v. Glastonbury, N. & C. Compy. C. Coop.* 42; this seems to be the point of the case.

(1) See 3 Daniell Ch. Pr. (Perkins's ed.) 2015, 2016.

for instance, three months for payment of the money (*i*) ; and under proper circumstances, the time will be enlarged (*k*). Upon a motion for this purpose, affidavits may of course be filed after the purchaser has put in his answer, stating the collateral circumstances (*l*).

12. Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into court. But where the seller at the time of the bill filed is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, although the seller is in possession of the estate, he will not be compelled to pay the deposit into court, because it is the fault of the purchaser and not of the seller that the latter retains both the deposit and the estate (*m*).

13. Where an estate is sold in lots to different persons, the vendor cannot include them in one bill, for each party's case is distinct, and must depend upon its own peculiar circumstances, and there must be a distinct bill upon each contract (*n*) (1). In demurring to a bill against distinct purchasers, as multifarious, the *defendants need not deny combination (*o*), although that was formerly deemed essential (*p*) (2).

14. And although by the conditions the purchaser of each lot is to join in the assignment to the purchaser of the other, yet the seller may file a bill against one for a specific performance without making the other a party (*q*).

15. A purchaser should not make the stewards or receivers of the vendor parties to his bill for a specific performance ; for although, as we have already seen, the vendor is deemed a trustee for the purchaser, yet this rule does not extend to the agents of the vendor (*r*).

16. If a person sell as an agent, the purchaser cannot, in a bill

(*i*) *Townshend v. Townshend*, L. I. Hall, March 3, 1817, Master of the Rolls for the Lord Chancellor, MS.

(*k*) *Brown v. Kelty*, Michaelmas Term, 1816, MS., the Vice Chancellor for the Lord Chancellor ; *Townshend v. Townshend*.

(*l*) *Bradshaw v. Bradshaw*, 2 Mer. 492 ; *Crutchley v. Jerningham*, *ib.* 502.

(*m*) *Wynne v. Griffith*, 1 Sim. & Stu. 147.

(*n*) *Rayner v. Julian*, 2 Dick. 677 ;

Brookes v. Lord Whitworth, 1 Madd. 86.

(*o*) *Brookes v. Whitworth*, 1 Mad. 86.

(*p*) *Bull v. Allen*, Bunb. 69.

(*q*) *Paterson v. Long*, 5 Beav. 186.

(*r*) *Macnamara v. Williams*, 6 Ves. jun. 148.

(1) Story Eq. Pl. §272. See *Wood v. Perry*, 1 Barbour, 114.

(2) 1 Daniell Ch. Pr. (Perkins's ed.) 621.

for a specific performance against the owners, make the agent a party, and pray in the alternative that he may pay the deposit and costs ; for his remedy against the agent, if he acted without authority, is at law (*s*).

17. And as a general rule, a purchaser ought not to make any person a party to his suit, in whom he alleges any adverse right to be vested : the question should be litigated between the seller and him alone, Can a good title be made ? In one case, however, where the seller had obtained a settled estate, under the exercise of a power to substitute another estate of equal value, Lord Hardwicke compelled him, upon his bill for a specific performance against a purchaser of the estate originally settled, to make the persons who claimed under the settlement parties to the suit. This, however, cannot be relied upon as a precedent (*t*).

18. The general rule is, that neither the vendor nor the purchaser can involve third persons in a proceeding to enforce a specific performance, any more than they could be made parties to an action for a breach of contract (1). Even where a mortgagee, claiming under the seller, is not willing to convey to the purchaser without having competent authority for so doing, he cannot be made a defendant to the purchaser's bill for a specific performance, nor can any person entitled to an interest in the equity of redemption be joined. The mortgagee is only subject to be redeemed, and is a stranger to the contract, and has no right to *dispute the title, and the purchaser has no right to redeem until his contract is completed (*u*). The purchaser, of course, may, in a suit against the seller alone, if he is entitled to the equity of redemption, compel him to redeem and to obtain a conveyance from the mortgagee.

19. But in a suit by the personal representative of a vendor, for specific performance, the real representative of the vendor is a necessary party (*x*) (2).

20. Where the plaintiff, in a bill for a specific performance, cannot prove his agreement, as laid ; but the defendant, who proves

(*s*) *Sainsbury v. Jones*, 2 Beav. 462 ; 5 Myl. & Cra. 1. *bertson v. G. W. Railway Company*, 10 Sim. 314.

(*t*) *Lamplugh v. Hebden*, 1 Dick. 78 ; (*u*) *Tasker v. Small*, 3 Myl. & Cra. 63 ;
Barnard, C. C. 371 ; 2 Eq. Ca. Abr. 170, 1 Hare, 548.
 pl. 29. See *Tasker v. Small*, 6 Sim. 633 ; (*x*) *Roberts v. Marchant*, 1 Phill. 370.
Wood v. White, 4 Myl. & Cra. 460 ; Ro-

(1) 1 Daniell Ch. Pr. (Perkins's ed.) 280.

(2) Story Eq. Pl. §160, §177, §177a ; *Morgan v. Morgan*, 2 Wheaton, 297, 298.

the agreement to be different, offers to perform specifically the agreement which he represents; the Court will execute the agreement as proved by the answer, without a cross-bill, although the plaintiff should wish to have the bill dismissed (*y*) (1), if the Court think the defendant entitled to a specific performance (*z*).

21. But, if a plaintiff insist upon a particular construction of a contract, and the Court decides against him, he will not be allowed a specific performance according to the construction against which he has contended. It is not like the case of a plaintiff calling upon the Court to construe and execute an agreement according to the true construction; suggesting that which he conceives to be so (*a*).

22. If a bill for a specific performance be dismissed, it would require a clear and distinct case to be made out and prayed, to entitle the plaintiff to an account of rents, or the like (*b*) (2).

23. If a purchaser have recourse to equity, and it appear that the vendor has, since the filing of the bill, sold the estate to another person, the Court will, it has been determined, refer it to a Master, to inquire what damage the purchaser has sustained; and the sum which shall be found due, together with costs, will be directed to be paid to him (*c*). This was decided by Lord Kenyon in *Denton v. Stewart*, and has since been followed by Sir W. Grant in *Greenaway v. Adams* (3).

(*y*) *Fife v. Clayton*, 13 Ves. jun. 546. and *Stevens v. Guppy*, 3 Russ. 171.

(*z*) *Higginson v. Clowes*, 15 Ves. jun. 516.

(*a*) *Clowes v. Higginson*, 1 Ves. & Beam. 524.

(*b*) *Williams v. Shaw*, 3 Russ. 178, jun. 395.

(*c*) *Denton v. Stewart*, 1 Cox, 258; 1 Ves. jun. 329; 17 Ves. jun. 276, cited; Reg. Lib. A. 1785, fol. 552, 717; *supra*, p. 140 n.; *Greenaway v. Adams*, 12 Ves. jun. 395.

(1) 1 Daniell Ch. Pr. (Perkins's ed.) 442; Story Eq. Pl. §394 note.

(2) 1 Daniell Ch. Pr. 436.

(3) See the remarks of Shepley J. in *Woodman v. Freeman*, 25 Maine, 531, 544, 550, 551, upon the cases cited in the text. The principle of these decisions was applied and acted upon by Mr. Chancellor Kent in *Phillips v. Thompson*, 1 John. Ch. 131, 150, 151. See *Warner v. Daniels*, 1 Woodb. & Minot, 113, 114. But in *Hatch v. Cobb*, 4 John. Ch. 559; and in *Kempshall v. Stone*, 5 John. Ch. 193, the learned Chancellor refused to act upon it, in consequence, apparently, of the doubt thrown over it by the suggestions of Lord Eldon in the case of *Todd v. Gee*, 17 Vesey, 273. In *Hatch v. Cobb*, there was a contract for the sale of land, and the payment of the purchase money was made a condition precedent to the conveyance; and after a default in payment by the vendee, the vendor accepted a part of the purchase money, but the vendee, though repeatedly called upon, refused to complete the payment. The vendor, after giving notice of his intention to do so, sold and conveyed the land to another; and the vendee, afterwards, tendered the money due on the contract, and filed a bill for its specific performance. The Chancellor said:—"A specific performance cannot be decreed. The defendant had fairly disabled himself before the suit was brought, and this was known to the plaintiff." "It is doubtful how far the court has jurisdiction to assess dam-

24. In a recent case, upon a specific performance, where Lord Eldon refused to direct an issue or an inquiry before the Master,

ages merely, in such a case, in which the plaintiff was aware, when he filed his bill, that the contract could not be specifically performed or decreed. It is properly a matter of legal cognizance. The case of *Denton v. Stewart*, 1 Cox, 258, was hesitatingly followed by Sir Wm. Grant, in *Greenaway v. Adams*, 12 Vesey, 395; but it has been much questioned by Lord Eldon, in *Todd v. Gee*, 17 Vesey, 273; and though equity, in very special cases, may possibly sustain a bill for damages, on a breach of contract, it is clearly not the ordinary jurisdiction of the court." *Kempshall v. Stone*, was a case somewhat similar to *Hatch v. Cobb*, and the Chancellor said:—"The more I have reflected on the subject, the more strongly do I incline to the opinion expressed in *Hatch v. Cobb*. Lord Eldon intimated, in *Todd v. Gee*, that the whole course of previous authority was against the decision of Lord Kenyon, in *Denton v. Stewart*, 1 Cox, 258; and in that case, Lord Eldon said, the defendant had disabled himself, *pendente lite*, from performing the agreement; and that fact materially distinguishes that case from this. When the defendant had disabled himself before the filing the bill, and the plaintiff *knew* of that fact before he commenced his suit, (and I consider such knowledge a material circumstance in the case,) it is then reduced to the case of a bill filed for the sole purpose of assessing damages for a breach of contract, which is a matter strictly of legal, and not of equitable jurisdiction. The remedy is clear and perfect at law, by an action upon the covenant; and if this court is to sustain such a bill, I do not see why it may not equally sustain one in every other case sounding in damages, and cognizable at law." See *Morss v. Elmendorf*, 11 Paige, 277; *Bradley v. Basley*, 1 Barbour Eq. 125. Where by mistake of both parties, as to the existence of a gore of land, one contracted to sell and convey, and the other to purchase and pay for, a supposed gore of land, which in fact had no actual existence, the vendor cannot file a bill in equity, for the specific performance of the contract, or for compensation in damages by the vendor, for not making the conveyance when requested to do so. *Morss v. Elmendorf*, 11 Paige, 277. This subject has been considered by Mr. Justice Story, 2 Story Eq. Jur. §796 to §799, and in conclusion he says;—"In the present state of the authorities, involving as they do, some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as ancillary to a specific performance or to some other relief. If it does attach in any other cases, it must be under very special circumstances, and upon peculiar equities; as, for instance, in cases of fraud; or in cases, where the party has disabled himself by matters *ex post facto* from a specific performance; or in cases, where there is no adequate remedy at law." *ib.* §799. See *Woodcock v. Bennett*, 1 Cowen, 711; *Gwillim v. Stone*, 14 Vesey (Sumner's ed.) 128 and note; *Fonbl. Eq. B. 1, Ch. 1, § 8* note (z); *Pratt v. Law*, 9 Cranch, 494; *Hepburn v. Auld*, 5 Cranch, 262, 275; *Sims v. Lewis*, 5 Munf. 29; *Warner v. Daniels*, 1 Woodb. & Minot, 113, 114; *McFerran v. Taylor*, 3 Cranch, 270; *Russell v. Clarke*, 7 Cranch, 69; *Berry v. Vanwinkle*, 1 Green Ch. 269. Although the party contracting to convey land to one, has since conveyed it to another, and this is known to the former, yet if it is a case of exclusive equity jurisdiction, a bill will lie to recover damages. *Jervis v. Smith*, 1 Hoff. Ch. Rep. 470.

In *Woodman v. Freeman*, 25 Maine, 531, it was decided, that one who has been induced to purchase land of another and to pay him for it, by the fraudulent representations of a third person, interested to effect such sale, cannot, in a court of equity, recover the amount so paid of such third person and require him to receive a conveyance of the land. In giving the decision of the court in the above case, Mr. Justice Shepley lays down the proposition, that courts of equity can give relief in equity by compensation in damages, in cases "where specific performance ought to have been, and could have been decreed upon the state of facts existing when the bill was filed, but cannot be decreed on a hearing of the cause, because the defendant, pending the suit, has voluntarily disabled himself to make a conveyance." To this point he cites *Denton v. Stewart*, *Todd v. Gee*, and *Woodcock v. Bennett*. The learned Judge adds; "the court will not permit itself to be ousted, by fraud or contrivance, of a jurisdiction rightfully and legally acquired, but will proceed against him, who thus attempts to injure another and impose upon the court, and will, by the assessment of damages, compel him to make

with a view to damages, he said, that the plaintiff must take that *remedy, if he chooses it, at law. In *Denton v. Stewart*, the defendant had it in his power to perform the agreement, and put it out of his power pending the suit. That case, if it was not to be supported upon that distinction, was not according to the principles of the Court (*d*). In *Jenkins v. Parkinson*, before Lord Brougham, he observed that, in *Todd v. Gee*, Lord Eldon did not in express terms overrule *Denton* and *Stewart*, but he did everything short of denying it to be law; that in *Greenaway v. Adams*, it was reluctantly followed, and in *Gwillim v. Stone* it was not followed; and he added, that the current of all the previous authorities against it, to which Lord Eldon refers in *Todd v. Gee*, may therefore be considered as restored after a temporary and dubious interruption, and it may now be affirmed that those two cases—*Denton* and *Stewart* and *Greenaway* and *Adams*—are no longer law (*e*); and this view has been confirmed by Lord Cottenham (*f*) (1). But if pending a suit for specific performance, the seller dispose of part of the property, *e. g.* stone in a quarry, the Court will take care that the purchaser, if he succeed in the suit, have full compensation for the damage which he sustains by the seller's act, and will, if necessary, enable an action to be brought to ascertain the amount of the damage (*g*).

25. In a late case (*h*), where a seller had, after a contract for sale, sold at an advance to another person, the bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It

(*d*) *Todd v. Gee*, 17 Ves. jun. 273; (*f*) *Sainsbury v. Jones*, 5 Myl. & Blore v. Sutton, 3 Mer. 237; *Kendall v. Cra.* 1.
Beckett, 2 Russ. & Myl. 88.

(*e*) 2 Myl. & Kee. 5, *sed qu.*

(*g*) *Nelson v. Bridges*, 2 Beav. 239.

(*h*) *Daniels v. Davison*, 16 Ves. jun. 249.

compensation for the injury. To do this is not to assume a jurisdiction, which does not legitimately belong to it, for the jurisdiction had already become right-fully vested and fixed there. If the much contested case of *Denton v. Stewart*, as Lord Eldon states in *Todd v. Gee*, was decided upon these principles, it would not seem to be liable to the strong disapprobation of it, expressed in other decided cases." 25 Maine, 544. See *Morse v. Elmendorf*, 11 Paige, 277; *Wiswall v. McGown*, 2 Barbour Sup. Ct. Rep. 270.

(1) See in next preceding note. In *Ferson v. Sanger*, Davies's Rep. 252, 261, Mr. Justice Ware said;—"Upon a review of all the cases, the rule practically established seems to be, that a court of equity will not take jurisdiction of a suit for damages, when that is the sole object of the bill, and when no other relief can be given." "But when other relief is sought by the bill, which a court of equity is alone competent to grant, and damages are claimed as incidental to relief, which cannot be obtained at law, then the court being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent multiplicity of suits, proceed to determine the whole cause."

was not necessary to decide the point ; but Lord Eldon observed, that the estate by the first contract, becoming the property of the vendee, the effect was, that the vendor was seised as a trustee for him ; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seised in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it (*i*) (1).

26. Equity cannot give the purchaser any compensation where he files a bill to have the contract delivered up on account of the defective title of the vendor. But he will obtain a decree for the delivering up of the contract without prejudice to his remedy at law for breach of it (*j*). Neither can he require such interest as the seller has in the estate and damages in respect of his defect of title (*k*).

27. Nor where the contract has been executed, can a bill be filed simply for compensation, *e. g.* where the rental of the estate was represented higher than its actual amount (*l*) (2).

28. If a purchaser take a line of defence which fails, yet if he have a good ground to avoid the contract, he may still avail himself of it as a bar to a specific performance (*m*).

29. A purchaser may of course have a right to avoid a purchase by matter *ex post facto*—as where the subject of sale was a gentleman's residence, and some of the ornamental timber was cut pending an investigation of the title (*n*).

30. If the abstract be not delivered in time, or objections arise to the title, the vendee may bring an action at law for non-performance of the agreement, in which case the vendor's remedy

(*i*) 17 Ves. jun. 433.

(*j*) *Gwillim v. Stone*, 14 Ves. jun. 128.
[Sumner's ed. notes.] *sed qu.*, as to the latter branch.

(*k*) *William v. Higden*, 1 C. Coop. 500.

(*l*) *Newham v. May*, 10 Price, 117.

(*m*) *Magennis v. Fallon*, 2 Moll. 591.

(*n*) S. C.

(1) Ante, 191 ; *Stone v. Bucknor*, 12 Smedes & Marsh. 73.

(2) Where an agreement has been executed, a court of equity will not decree a further specific performance. *Tucker v. Clarke*, 2 Sandford Ch. 96. So, where one without title, conveys land, with covenant of seisin, he cannot afterwards maintain a bill to compel the grantee to receive a good title, but the grantee will be entitled to his action for the breach of covenant. *ib.*

(if he can insist upon the contract being specifically performed) is, to file a bill for a specific performance, and an injunction to restrain the proceedings at law, and the vendor may file his bill for a performance in specie, although the vendee may have recovered his deposit at law (o) (1).

II. Of the Remedy at Law.

31. If a purchaser, upon a bill being filed for a specific performance, pay the purchase-money without putting in an answer, and afterwards discover that a fraud was committed in the sale, he is not precluded from bringing an action for damages if he come recently after discovery of the deception (p).

32. But if a defendant in a suit for a specific performance, after a decree, bring an action at law against the plaintiff in equity for damages, and the decree proceeded upon the ground that he had waived the literal performance of the thing, for breach of which the action is brought, *e. g.* the time appointed for performance of the contract, equity will enjoin the action (q).

33. So equity will restrain the seller from bringing an action where the bill was dismissed because he had no title (r).

*34. But although a seller's bill for a specific performance be dismissed, yet he may in general still bring his action at law for breach of the agreement; and there are instances of sellers recovering damages in such cases. When the Court refuses its interference, and yet thinks that the seller is entitled to enforce his contract at law, it is usual to add a declaration to the decree, that it is without prejudice to the plaintiff's remedy at law. In like manner, a purchaser, although he cannot prevail upon the Court to assist him, is frequently left at liberty to enforce his right to damages at law (s) (2).

35. If a purchaser recover damages in an action for breach of the agreement, he cannot bring a second action, or resort to any other means to enforce the contract. The first action alleges the grievance to be the loss sustained by breach of the contract, and that is to be deemed an election as to the remedy sought (t) (3).

(o) Vide *infra*, ch. 8 & 10.

(p) *Jendwine v. Slade*, 2 Esp. Ca. 257.

(q) *Reynolds v. Nelson*, 6 Mad. 290.

(r) *M'Namara v. Arthur*, 2 Ball. & Beat. 349.

(s) *Infra*, s. 5.

(t) 10 Bing. 537, 538, 540.

(1) See in next preceding note.

(2) 2 Daniell Ch. Pr. (Perkins's ed.) 1200, 1201; Seton on decrees, 382.

(3) Per Shepley J. in *Hill v. Hobart*, 16 Maine, 169; *Hopkins v. Lee*, 6 Wheats., 109; *Buckmaster v. Grundy*, 3 Gilman, 626. A recovery of damages, in an

36. But where a purchaser failed in an action to recover his deposit and liquidated damages under the contract, upon the ground that the vendor had not broken the contract, and the vendor after the issuing of the writ in that action resold the estate, it was held that the purchaser might maintain a new action for the deposit, for the former action failed because it was prematurely brought, viz., before the contract was rescinded, and before the seller had disabled himself from completing it. The former judgment, therefore, formed no obstacle to the recovery when that event had taken place (*u*).

37. Where the purchaser has paid any part of the purchase-money, and the seller does not complete his engagement, so that the contract is totally unexecuted, he, the purchaser, may affirm the agreement, by bringing an action for the non-performance of it, or he may elect to disaffirm the agreement *ab initio*, and may bring an action for money had and received to his use (*x*) (1).

(*u*) *Palmer v. Temple*, 1 Per. & Dav. 379; 9 Adol. & Ell. 508. *ingale*, 2 Esp. Ca. 639; *Hunt v. Silk*, 5 East, 419; *Squire v. Tod*, 1 Camp. Ca.

(*x*) See 2 Burr. 1011; *Farrer v. Nightingale*, 293. See *Levy v. Haw*, 1 Taunt. 65.

action for the breach of a covenant, by the grantee of land for the purpose of a public square, to grade, enclose, and improve the premises, is a bar to a bill for the specific performance of such covenant. *Stuyvesant v. Mayor, &c. of New York*, 11 Paige, 414. But a recovery for the breach of a covenant to forever keep the premises open as a public square, is not a bar to a subsequent bill for specific performance of the covenant, it being a continuing covenant. *ib.*

(1) See post, 262 note; *Chitty Contr.* (8th Am. ed.) 539; *Weaver v. Bentley*, 1 Caines Rep. 47; *Gillet v. Maynard*, 5 John. 85; *Williams v. Reed*, 5 Pick. 480; *Goddard v. Mitchell*, 17 Maine, 366. Where money is paid by one party in contemplation of some act to be done by the other, which is the sole consideration of the payment, and the thing stipulated to be done is not performed, the money may be recovered back. Per *Parker Ch. J.* in *Griggs v. Austin*, 3 Pick. 20; *Carter v. Carter*, 14 Pick. 424; *Harrison v. Chilton*, 5 Yerger, 293; *Lyon v. Annable*, 4 Conn. 350. Money paid on an agreement, void under the statute of frauds, which the defendant cannot or will not complete, may be recovered back. *Buck v. Waddle*, 1 Ham. (Ohio), 363; *Gillett v. Maynard*, 5 John. 85; *Rice v. Peet*, 15 John. 503; *Thompson v. Gould*, 20 Pick. 134; *Lane v. Shackford*, 5 N. Hamp. 133; *Richards v. Allen*, 17 Maine, 296; *Appleton v. Chase*, 19 Maine, 74; *Geer v. Geer*, 18 Maine, 16; *Beaman v. Buck*, 9 Smedes & Marsh. 207; *Abbott v. Draper*, 4 Denio, 51; *Sims v. Hutchins*, 8 Smedes & Marsh. 328. But in *Fuller v. Hubbard*, 6 Cowen, 13, it was held that, where a valid contract was made to pay for and receive a conveyance of land, and the money was paid, but no deed executed, the vendee could not rescind the contract and recover back the money, but should sue on the agreement, as one still subsisting. See also *Goddard v. Mitchell*, 17 Maine, 366; *Clark v. Smith*, 14 John. 326.

In an action for money had and received, it was held, that the cases in which a vendee is allowed to recover back money paid on a contract for the purchase of real estate, where the contract has been rescinded are—1st where the rescission is voluntary and with the mutual consent of the parties, and without default on either side,—2d where the vendor cannot or will not perform the contract on his part,—3d where the vendor has been guilty of fraud in making the contract. Per *Wells J.* in *Battle v. Rochester City Bank*, 5 Barbour Sup. Ct. Rep. 414. But where the vendor is in no default, and the rescission is in consequence of an unexcused default of the vendee, the vendee cannot recover back money paid by him

38. In this latter action, however, the plaintiff cannot recover more than the money paid, although the estate has risen in value ; while, on the other hand, it may perhaps be thought, that if the estate has experienced a diminution in value, he can only recover the damages he sustained by the estate not being conveyed, that being the only money retained by the defendant against conscience ; and therefore the plaintiff, *ex æquo et bono*, ought not to recover any more (*y*).

*39. The right to disaffirm the agreement is, in some cases, of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement the agent appear to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engagement, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser (*z*). Where the purchase-money is paid to the seller's agent, he is not, like an auctioneer, a mere stakeholder, and consequently the action to recover the money must be against the seller himself (*a*).

40. But if a man enter into a contract expressly *as agent for a third person*, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal (*b*) (1).

41. Although the contract is under seal, and the purchaser might for a breach of the contract maintain an action of covenant for the breach of the contract, yet he may also, if he have a right to rescind the contract, bring an action for money had and received, to recover back his purchase-money. The seller holds the money against conscience, and therefore might be compelled to refund it by an action for money had and received (*c*) (2).

(*y*) See *Moses v. M'Farlan*, 2 Burr. 1005 ; *Dutch v. Warren*, *ib.* 1010, cited ; and Str. 406 ; *S. C. Dale v. Sollet*, 4 Burr. 2133, *sed qu.*
 (*z*) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337. See *Edden v. Read*, 3 Camp. Ca. 338 ; *Bethune v. Farebrother*, 5 Mau. & Selw. 385, 391, cited.
 (*a*) *Barnford v. Shuttleworth*, 11 Adol. & Ell. 926.
 (*b*) *Bickerton v. Burrell*, 5 Mau. & Sel. 383.
 (*c*) *Greville v. Da Costa*, Peake's Add. Cas. 113.

on the contract. *ib.* *Green v. Green*, 9 Cowen, 46 ; *Ketchum v. Evertson*, 13 John. 365 ; *Sims v. Boaz*, 11 Smedes & Marsh. 318.

(1) See *Dunlap's Paley's Agency*, 362, 363.

(2) But see *Goddard v. Mitchell*, 17 Maine, 366.

42. We shall elsewhere see that, generally speaking, a purchaser, where a title cannot be made, is not entitled to damages for the fancied loss of his bargain (*d*).

43. And in a case (*e*) where an auctioneer who had advanced some money on an estate, sold it by auction after the authority from his principal had expired, and the principal refused to confirm the sale, the Court of Common Pleas, in an action brought by the purchaser, in which he declared on the agreement, and for money had and received, &c. would not allow him damages for the loss of his bargain, although it was proved that the estate was worth nearly twice the sum which he gave for it.

*44. Nor in a case of this nature is a purchaser entitled to any compensation, although he may be a loser by having sold out of the funds, which may have risen in the meantime, because he had a chance of gaining as well as losing by a fluctuation of the price (*f*) (1).

45. But a purchaser is entitled to interest on his deposit (*g*); and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that (*h*). Where the plaintiff recovers under a special count on the original contract, which, we have seen, affirms the agreement, interest will be given as part of the damages for non-performance of the agreement (2): where he can only recover under a count for money had and received, which disaffirms the contract — as if the contract was by parol for the sale of lands (*i*) (3); or the seller had not bound himself by the signature of himself or his agent (*k*), he cannot recover interest, for, as a general rule, interest cannot be recovered in an action for money had and received (*l*) (I) (4). But where the

(*d*) *Infra*, ch. 8.

(*e*) *Bratt v. Ellis*, MS. Appendix, No. 7; and see *Jones v. Dyke*, MS. Appendix, No. 8; *Sainsbury v. Jones*, 5 Myl. & Cra. 1.

(*f*) *Flureau v. Thornhill*, 2 Blackst. 1078.

(*g*) See ch. 16, *infra*.

(*h*) *Flureau v. Thornhill*, *ubi sup.*; *Hodges v. Lord Litchfield*, 1 Bing. N. S.

492.

(*i*) *Walker v. Constable*, 1 Bos. & Pull. 306.

(*k*) *Gosbell v. Archer*, 2 Adol. & Ell. 500; 4 Nev. & Man. 485.

(*l*) *Tappenden v. Randall*, 2 Bos. & Pull. 472; *Fruhling v. Schroeder*, 2 Bing. N. C. 77; and see *Dobell v. Hutchinson*, 3 Adol. & Ell. 355, and 3 & 4 Will. 4, c. 42, s. 28.

(1) Notwithstanding the observation in 2 Bing. N. C. 80, *Lord Ellenborough*, in *De Bernales v. Fuller*, 2 Camp. Ca. 426, does not appear to have laid down a general rule that interest cannot be recovered in an action for money had and received; see also *De Havilland v. Bowerbank*, 1 Camp. Ca. 50, and *post*, ch. 16.

(2) See *Thayer v. Clemence*, 22 Pick. 490; *King v. Pyle*, 8 Serg. & R. 166. (3) *Chitty Contr.* (8th Am. ed.) 277, 278; *Metcalfe v. Fowler*, 6 Mees. & Welsb. 830; *Robinson v. Hardman*, 1 Exch. 850; *Hopkins v. Grazebrook*, 6 Barn. & Cress. 31.

(3) See ante, 256, note.

(4) See *Chitty Contr.* (8th Am. ed.) Tit. Interest. In *Pease v. Barber*, 3 Caines

contract is a valid one, the deposit may be recovered as money had and received, and where there is a count for it, interest also, it should seem, as damages sustained by the plaintiff by reason of the money having been withheld from him.

46. Where the agreement is a binding one, the purchaser may also, as we shall hereafter see, recover the expenses of investigating the title (*m*) (1).

47. Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any of the objections in point of law arising upon the abstract (*n*).

*48. But although the purchaser assign by way of special damage, that he has incurred certain expenses, yet he will not be compelled to furnish particulars of such special damage (*o*).

49. Where in a single count there were several allegations of damage, the vendor, the defendant, was not allowed to select some of the items and pay the money into court; the whole count taken together was in substance of a demand of unliquidated damages. As the seller had broken his contract with the plaintiff, the Court would not help him to pare down the demand so as to compel the plaintiff to go to trial at his own risk (*p*).

50. Where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement (*q*).

51. We shall elsewhere consider how the title must be averred in order to sustain the seller's action (*r*), and whether it is necessary to prove the execution of the title-deeds (*s*); and also, whether a court of law can take notice of equitable objections to a title (*t*).

(*m*) See *post*, ch. 8.

(*n*) *Collet v. Thomson*, 3 Bos. & Pull. 246; *Roberts v. Rowlands*, 3 Mees. & Wels. 543, *post*, ch. 8.

(*o*) *Retallick v. Hawkes*, 1 Mees. & Wels. 573.

(*p*) *Hodges v. Lord Litchfield*, 9 Bing. 713.

(*q*) *Squire v. Tod*, 1 Camp. Cas. 293.

(*r*) *Post*, ch. 8.

(*s*) *Post*, ch. 8, 9.

(*t*) *Post*, ch. 10.

Rep. 266, it was decided, that interest could be recovered in this action; whether or not such recovery of interest shall be had in any particular case depends on the circumstances. *ib.* If the defendant is in default in not paying over the money he should be charged with interest. *Dodge v. Perkins*, 9 Pick. 369, 386; *Marvin v. McRea*, 1 Cheves Law, 61; *Porter v. Nash*, 1 Alabama, 452, 456; *Wood v. Robbins*, 11 Mass. 504, 506; *Johnson v. Eicke*, 7 Halsted, 316, 319; *Bell v. Dogan*, 7 J. J. Marsh. 593, 594; *Vance v. Vance*, 5 Monroe, 521, 525.

(1) *Chitty Contr.* (8th Am. ed.) 277, 278; *Richardson v. Chasen*, 10 Q. B. 756.

52. The seller where the contract is not completed cannot of course recover the whole of the purchase-money, and keep the estate too (1); he is only to have made good his loss by the diminution in the value of the land, or the loss of the purchase-money in consequence of the non-performance of the contract (*u*).

53. If the purchaser die, his heir cannot sue at law for a breach upon a mere agreement to sell, but where there has been a breach in the purchaser's life-time, and a loss to his personal property, his personal representative may maintain an action, *e. g.* for damage incurred by the loss of interest on the deposit, and the expenses of investigating the title (*x*) (2).

54. If the agreement is in the hands of one of the parties, or his attorney, equity, in case a bill is filed, will compel it to be delivered up to the other party, in order that it may be stamped (*y*). So, in case of an action, if only one part of the agreement has been executed, the party, in whose possession it is, shall be compelled to produce it to the other party (*z*), and it is not important that the contract was made with the auctioneer, and not with the seller, who *is the defendant (*a*). And if there are even two parts, but one only is stamped, the party having the unstamped part may give secondary evidence of the contents of the agreement, if the other, after notice, refuse to produce the stamped part (*b*). Where one party produces the agreement, under a notice from the other, the latter need not call the subscribing witness to prove the execution of the agreement, as the defendant takes an interest under it (*c*) (3). Where the purchaser has signed an agreement, he cannot, in an action for the deposit, avoid producing the agreement, by merely producing the conditions of sale and the auctioneer's catalogue of sale (*d*).

(*u*) *Laird v. Pim*, 7 Mees. & Wels. 474.

(*x*) *Orme v. Broughton*, 10 Bing. 533 [misprinted in report].

(*y*) *Supra*, p. 115.

(*z*) *Blakey v. Porter*, 1 Taunt. 386; *Bateman v. Philips*, 4 Taunt. 157; *King v. King*, *ib.* 666; *Street v. Brown*, 1 Marsh. 610.

(*a*) *Ginger v. Bayly*, 5 Moo. 71.

(*b*) *Garnons v. Swift*, 1 Taunt. 507. See *Waller v. Horsfall*, 1 Camp. Ca. 501.

(*c*) *Bradshaw v. Bennett*, 5 Carr. & Pay. 48.

(*d*) *Curtis v. Greated*, 2 Nev. & Mann. 449.

(1) Nor after such recovery, can the seller claim to have the contract set aside, *Nelson v. Carrington*, 4 Munf. 332.

(2) See *Shaw v. Wilkins*, 8 Humph. 647.

(3) This doctrine has been recognized and acted on in the American Courts. *Rhoades v. Selin*, 4 Wash. C. C. 715, 719; *Betts v. Badger*, 12 John. 223; *Jackson v. Kingsley*, 17 John. 158. See further *Jones v. Coopridge*, 1 Blackf. 49; *McPherson v. Rathbone*, 7 Wendell, 216, 219, Per Savage Ch. J.; *Stephenson v. Dunlap*, 7 Monroe, 134, 137, Per Mills J.

55. An agreement, as we have seen, may be established by a correspondence, and in that case, the letters form the agreement, but one stamp only is required to them all, as constituting one agreement (e).

56. Before quitting this subject, it must be remarked, that in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a contrary intention does not appear (f), (I), (1). The true rule, Mansfield, C. J. (g), said, was, that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties (2).

57. The old law was certainly in favor of the contrary doctrine (h): but if, as Lord Kenyon observed, the Courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract and the final execution of it he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid (i), (II).

*58. If, therefore, either a vendor or vendee wish to compel the

(c) *Stead v. Liddard*, 1 Bing. 196. 233. See *Havelock v. Geddes*, 10 East, 555.
See *Atherstone v. Bostock*, 2 Mann. & Grang. 511.

(f) [Taylor v. Gallup, 8 Vermont, 340; *Siddell v. Sims*, 9 Smedes & Marsh. 596.] As to where covenants are precedent, and where dependent, see Mr. Serjeant Williams's note (4) to 1 Saund. 320; *Dawson v. Dyer*, 5 Barn. & Adol. 584.

(g) *Smith v. Woodhouse*, 2 New Rep.

(h) 8 Term Rep. 370, 371.

(i) See *Duke of St. Alban's v. Shore*, 1 H. Black. 270; *Goodisson v. Nunn*, 4 Term Rep. 761; *Glazebrook v. Woodrow*, 8 Term Rep. 366; and *Heard v. Wadham*, 1 East, 619; and see *Amcourt v. Elever*, 2 Kel. B. R. 159; *Carpenter v. Cresswell*, 4 Bing. 409; 1 Moo. & Pay. 66.

(I) In *Morris v. Knight*, T. 2 Jac. II. B. R. there were mutual covenants: one agreed to pay a sum of money for a lease for years; the other covenanted that he should enter in twenty days, and that he would make a demise thereof, from, &c., and the plaintiff brought an action for non-payment of the money before the demise made, held not good, for the lease is the consideration: so judgment for the defendant. MS.

(II) As to this point in bankruptcy, vide *supra*, s. 1, and *post*, ch. 12 & 21.

(1) *Peques v. Mosby*, 7 Smedes & Marsh. 340.

(2) The intention of the parties as collected from the language of their contract is the true guide in such cases. *Howland v. Leach*, 11 Pick. 154; *Manning v. Brown*, 1 Fairf. 51; *Platt on Covenants*, 72 to 80; *Couch v. Ingersoll*, 2 Pick. 300; *Barruso v. Madan*, 2 John. 145, 148; *Balch v. Smith*, 12 N. Hamp. 444; *Todd v. Summers*, 2 Grattan, 167; *Dwiggins v. Shaw*, 6 Iredell, 46; *Wright v. Smyth*, 4 Watts & Serg. 527; *Adams v. Williams*, 2 Watts & Serg. 227; *Low v. Marshall*, 17 Maine, 232; *Lawrence v. Dole*, 11 Vermont, 549. The intention of the parties is to be discovered, rather from the order of time in which the acts are to be done, than from the structure of the instrument or the arrangement of the covenants. *Goodwin v. Lynn*, 4 Wash. C. C. 714; *Speake v. Sheppard*, 6 Harr. & John. 85; *Gardiner v. Corson*, 15 Mass. 504.

other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal (1).

59. Thus a vendor cannot bring an action for the purchase-money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing (*k*) (2); but if the purchaser give a bill of exchange, or other security, for the purchase-money, payable at a certain day, he must pay it when due, and cannot resist the payment even in the case of a bill of exchange, on the ground that there was no consideration for the drawing of the bill, because the seller has refused to convey the estate according to the agreement (3). But he will have his remedy

(*k*) Jones v. Barkley, Dougl. 684; Phillips v. Fielding, 2 H. Black. 123; and see Wels. 477; this passage was not intended to refer to the amount to be recovered. 3 East, 443. See Laird v. Pim, 7 Mees. &

(1) See Chitty Contr. (8th Am. ed.) 273, 274, 275; Shirley v. Shirley, 7 Blackf. 542; Green v. Reynolds, 2 John. 145; Ramsay v. Brailsford, 2 Desaus. 582; Tinney v. Ashley, 15 Pick. 546; Howe v. Huntington, 15 Maine, 350; Swan v. Drury, 22 Pick. 485; Warren v. Wheeler, 21 Maine, 484; Sewall v. Wilkins, 14 Maine, 168; Ledyard v. Manning, 1 Alabama, 153; Halloway v. Davis, Wright, 129; Sims v. Boaz, 11 Smedes & Marsh. 318; Green v. Green, 9 Cowen, 49; Morrison v. Ives, 4 Smedes & Marsh. 652. A mere readiness to perform is not sufficient. Johnson v. Wygant, 11 Wendell, 48, 49, Per Sutherland J. But see Tinney v. Ashley, 15 Pick. 546; Low v. Marshall, 17 Maine, 232.

(2) Green v. Reynolds, 2 John. 207; Jones v. Gardiner, 10 John. 266; Porter v. Rose, 12 John. 212; Parker v. Parmele, 20 John. 130; Gazley v. Price, 16 John. 267; Hudson v. Swift, 20 John. 24; Hunt v. Livermore, 5 Pick. 395; Warner v. Hatfield, 4 Blackf. 392; Taylor v. Perry, 5 Blackf. 599; Smith v. Henry, 2 English, 207. In an action, by a vendor against a vendee, on a contract by which the latter covenants to pay to the former a sum certain in three annual instalments, upon the payment whereof, he is to receive a deed of land, the plaintiff, if he waits to bring his action until all the instalments have fallen due, must aver in his declaration *an actual tender of a deed or an offer to execute the same*. Johnson v. Wygant, 11 Wendell, 48. But see Tinney v. Ashley, 15 Pick. 546. When one party demands of the other the performance of a mutual agreement, by which concurrent acts are to be performed by each party, an offer on the part of the party making the demand, to perform his part of the agreement, is implied and understood; and when the other party refuses to comply, he thereby dispenses with any other offer. And where he neglects to comply without offering any reason for his non-compliance, the legal effect is the same. Per Wilde J. in Tinney v. Ashley, 15 Pick. 552.

(3) Manning v. Brown, 1 Fairf. 49. By articles of agreement between A. and B. the former covenanted to convey to the latter a certain lot of land, if certain notes given at the same time, payable at a future day, should be paid at maturity by B.; and by said articles it was therein further agreed, that on failure of payment of said note by B., the agreement was to be void—B. to be liable to pay all the damages that should thereby have accrued to A.—and to forfeit all that should previously have been paid. In a suit on one of the notes, it was held, that the promise on the notes, and the promise or covenant to convey, were independent, and that a suit on the former might well be maintained without showing a conveyance or offer to convey; but by enforcing payment of the notes, the vendor waived the right to avoid his covenant to convey. Manning v. Brown, 1 Fairfield, 49. See Brashier v. Gratz, 6 Wheaton, 528; Bank of Columbia v. Hag-

upon the agreement for the non-execution of the conveyance (l). And if the purchaser, had he actually paid the money secured by the note as a deposit, would have been entitled to recover it back—as where the agreement could not be performed by the seller—it is not clear that he, the purchaser, might not resist the payment of the note on the ground of want of consideration, but whilst the contract remains open, he cannot resist the payment of the note (m).

60. In a late case (n), although the purchase-money was to be paid *as the consideration of such sale and purchase*, with interest *to the time of the completion of the purchase*, yet as a time was fixed for payment and none for the conveyance, it was held that an action for not executing a conveyance might have been maintained by the purchaser before the day of payment, and no allegation of payment would have been necessary (1); and an action by the seller for the money was sustained, although he had not tendered a conveyance. So where the agreement was to sell and purchase, and the purchaser agreed to pay to the seller the purchase-money before the expiration of four years, with interest half-yearly till paid, the seller was allowed within the four years to recover an arrear of interest for the purchase-money still unpaid, without averring *title, delivery of possession, or readiness to convey, for no time was fixed for the completion of the sale, but a time was limited within which the money was to be paid, with interest in the meantime (o) (2).

(l) See *Moggridge v. Jones*, 14 East, 486; 3 Camp. Ca. 38; and see *Swan v. Cox*, 1 Marsh. 176; *Spiller v. Westlake*, 2 Barn. & Adolph. 155; *Wilks v. Smith*, 10 Mees. & Wels. 355.

(m) See 2 Barn. & Adol. 157, 158.

(n) *Mattock v. Kinglake*, 10 Adol. & Ell. 50. *Qu.* if it was incumbent on the seller to tender a conveyance; see the case.

(o) *Wilks v. Smith*, 10 Mees. & Wels. 355.

ner, 1 Peters (S. C.) 455; *Heppburn v. Auld*, 5 Cranch, 262; *Winter v. Livingston*, 13 John. 54.

(1) *Eveleth v. Scribner*, 3 Fairfield, 24; *Chitty Contr.* (8th Am. ed.) 633; *Dox v. Dey*, 3 Wendell, 356; *Dicker v. Jackson*, 6 Manning, Grang. & Scott, 103; *Barksdale v. Toomer*, 2 Bailey, 180; *Bank of Columbia v. Hagner*, 1 Peters, 464, 465; *Ackley v. Elwell*, 5 Halsted, 304; *Central Turnpike Co. v. Valentine*, 10 Pick. 142; *Bradford v. Gray*, 3 Yerger, 463; *Morris v. Sliter*, 1 Denio, 59; *Babcock v. Wilson*, 17 Maine, 372; *Sayre v. Craig*, 4 Pike, 10.

(2) If a day is appointed for performing a covenant on one part, and it is to happen or may happen before the covenants on the other part are to be performed, the covenants are independent. Per *Wilde J.* in *Couch v. Ingersoll*, 2 Pick. 300, 301; 1 *Williams's Saunders*, 320, note (4); *Seers v. Fowler*, 2 John. 272; *Cunningham v. Morrell*, 10 John. 204; *Lord v. Belknap*, 1 Cushing, 284; *Hageman v. Sharkey*, 1 Howard (Miss.) 277; *Mayers v. Rogers*, 5 Pike, 417; *Duncan v. Charles*, 4 Scammon, 561; *Dicker v. Jackson*, 6 Mann. Gr. & Scott, 103. So where the money was to be paid to a third person and not to the vendor, that circumstance has been supposed to indicate the intention and understanding of the par-

61. On the other hand, a purchaser cannot maintain an action for breach of contract, without having tendered a conveyance, and the purchase-money (*p*) (1).

(*p*) See 1 Esp. Ca. 191; *Ex parte Hylliard*, 1 Atk. 147.

ties that the payment was to be first made, and, in an action by the vendor, a general averment of readiness on his part to perform was held sufficient in such case. *Northup v. Northup*, 6 Cowen, 296; *Slocum v. Despard*, 8 Wendell, 615, 618; *Per Sutherland J. in Johnson v. Wygant*, 11 Wendell, 50, 51.

(1) Acc. *Byers v. Aiken*, 5 Pike, 419; *Drennere v. Boyer*, 5 Pike, 497. And see *Chitty Contr.* (8th Am. ed.) 275; *Fairbanks v. Dow*, 6 N. Hamp. 266; *Stockton v. George*, 7 Howard (Miss.) 172. But in New York and many other states, the purchaser is not bound to tender a conveyance. His duty is to tender the purchase money and demand a deed, which the vendor must prepare and execute at his own expense. See note next page; *Hudson v. Swift*, 20 John. 24; *Hackett v. Huson*, 3 Wendell, 250; *Fuller v. Hubbard*, 6 Cowen, 13; *Fuller v. Williams*, 7 Cowen, 53; *Barrett v. Browning*, 8 Missouri, 689; *Brown v. Hart*, 7 Blackf. 429; *Standifer v. Davis*, 13 Smedes & Marsh. 48.

To put the vendor in default, in New York, it was formerly held to be necessary, that the vendee should pay or tender the purchase money, demand a deed, wait a reasonable time for the vendor to have it drawn, and then present himself to receive it. *Hackett v. Huson*, 3 Wendell, 250; *Fuller v. Hubbard*, 6 Cowen, 13; *Fuller v. Williams*, 7 Cowen, 53; *Connelly v. Pierce*, 7 Wendell, 129, 131; *Wells v. Smith*, 2 Edwards, 78. See *Fairbanks v. Dow*, 6 N. Hamp. 266; *Smith v. Robinson*, 11 Alabama, 840; *Hunter v. O'Neil*, 12 Alabama, 37. And where the vendor died, the same demand must have been made and time allowed to his representatives. *Fuller v. Williams*, 7 Cowen, 53.

But in *Carpenter v. Brown*, 6 Barbour Sup. Ct. Rep. 147, it was held, that, if, upon the sale and purchase of land, the vendor covenants to deliver a deed of the premises on a certain specified day, and the purchaser has paid the consideration and there is nothing for him to do as a condition precedent, the duty of the vendor, to deliver the deed on the day fixed, is absolute. He should, therefore, prepare the deed, and be ready to deliver it when demanded. One request (even if any request is necessary,) is enough to put him in default. And in an action for the breach of such an agreement, a request or demand need not be laid specially. The general allegation, that the defendant was often requested to execute a deed, is sufficient. And in this case, the doctrine stated above, that the vendee should call on the vendor and request the execution of a deed, and after waiting a reasonable time, call again to receive it, is expressly declared not to be the law. See the remarks of Gridley J. pp. 148, 149.

Under the rule, as it was formerly supposed to exist in New York, it was held, that the purchaser might avoid the necessity of a second demand, by tendering, on the first demand, a deed prepared for execution. *Connell v. Pierce*, 7 Wendell, 129, 132; *Wells v. Smith*, 2 Edwards, 78. In case the vendor refuses to give a deed, the vendee may sue on the agreement without waiting to have a conveyance prepared or presenting himself to receive it. *Foot v. West*, 1 Denio, 544. Where the purchaser sues to recover back part of the consideration money, paid by him on the contract, he must show that he has tendered the residue of the purchase money, and demanded a deed, so as to put the vendor in default. *Hudson v. Swift*, 20 John. 24. See *Green v. Green*, 9 Cowen, 46; *Fuller v. Hubbard*, 6 Cowen, 13; ante, 256 and note.

Where no place is fixed for the payment of the purchase money, a tender of the money and demand of a deed at the residence of the vendor, on the day named for the execution of the contract, are a sufficient compliance on the part of the purchaser, and give him a right of action against the vendor. If the latter, at the time of such tender and demand, be absent from home, a personal tender is not necessary. *Smith v. Smith*, 25 Wendell, 405. See *Franchot v. Leach*, 5 Cowen, 506.

If the obligee in a bond for a deed, on the last day of performance, say to the obligor, that the money is ready for him whenever he will give a deed, but produces no money, and the other party replies that he will procure him a deed, but

62. It was always clear that the vendor need not tender a conveyance where the purchaser was required to prepare it (*q*), or to bear the expense of it (*r*). But the general proposition was rendered doubtful by some recent *dicta* of the Judges (*s*), that it is incumbent on the *vendor* to prepare and tender a conveyance, which, as a general rule, certainly seems to have prevailed when the simplicity of the common law prevailed, and possession was the best evidence of title (1); but upon the introduction of modifications of estates, unknown to the common law, and which brought with them all the difficulties that surround modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel: and it then became usual for him to prepare the conveyance. This practice has continued, and is now the settled rule of the Profession: the rule is, indeed, sometimes departed from, but this seldom happens, except in the country, and it always arises from consent, or express stipulation.

63. In a late case (*t*), this point came distinctly before the Court of Exchequer, and it was, in conformity to the practice of the Profession, decided, that the purchaser, and not the vendor, is bound to prepare and tender the conveyance. In the early case of *Webb v. Bettel* (*u*), the same rule was expressly recognized by Windham, J. and denied by no one. He said, "that where a person is to execute a conveyance generally, there the counsel of the purchaser is intended to draw it, and then the purchaser ought to tender it."

64. It is settled, that if a conveyance is to be prepared at the expense of a purchaser, he is bound to tender it (*x*). Now it is admitted on all hands, that the expense of the conveyance must *be borne by the purchaser, if there be no express stipulation to the contrary (2). Therefore, where there is no such stipulation, the purchaser is bound to tender the conveyance. In a late case in the

(*q*) *Hawkins v. Kemp*, 3 East, 410.

(*r*) *Seward v. Willock*, 5 East, 198.

(*s*) Lord Rosslyn, in *Pincke v. Curteis*, 4 Bro. C. C. 332; *Macdonald, C. B.* in *Growsock v. Smith*, 3 Anstr. 877; Lord Kenyon, in *Heard v. Wadham*, 1 East, 627; and Lord Eldon, in *Seton v. Slade*, 7 Ves. jun. 278.

(*t*) *Baxter v. Lewis*, 1 Forrest's Rep. Exch. 61; and see *Martin v. Smith*, 2 Smith, 543; *Hallowell v. Morrell*, 1 Scott New Rep. 309; but see *Standley v. Hemmington*, 6 Taunt. 561; 2 Marsh. 276.

(*u*) 1 Lev. 44.

(*x*) *Seward v. Willock*, 5 East, 198.

immediately goes away, this is not a waiver of the tender thereof. *Drummond v. Churchill*, 17 Maine, 325.

(1) The rule, here said formerly to have prevailed in England, seems to be the one adopted in the United States. See note on next page.

(2) But see next note.

Court of Exchequer, where a lease was to be prepared at the sole expense of the lessor, it was held that he was to prepare it, and not the lessee. It may be, indeed, that one may be bound by the express terms of a contract to prepare a lease or conveyance, and yet that it shall be paid for by another, for such stipulations are not inconsistent; but where all that is stipulated for is, that it shall be prepared at the expense of the lessor, and there is no contract to explain it, it must be intended that the lessor is to prepare it also (*y*).

65. Upon the whole, notwithstanding the recent *dicta* to the contrary, as the precise point came before the Court of Exchequer, in *Baxter v. Lewis*, and their decision accords with the *uniform practice* of conveyancers, which has always met with the greatest attention in courts of justice (*z*), we may be warranted in saying, that the purchaser, and not the vendor, ought to prepare and tender the conveyance. And so the point has been finally decided (*a*) (1).

66. It has been said that a stipulation that the purchaser shall bear the costs of the contract, would entitle the vendor to the costs of making out his title (*b*).

67. But although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit, without tendering a conveyance (*c*). So where a vendor has, by selling the estate, incapa-

(*y*) *Price v. Williams*, 1 Mees. & Wels. 6; see *Mattock v. Kinglake*, 10 Adol. & Ell. 50; *Laird v. Pim*, 7 Mees. & Wels. 474.

(*z*) See 2 Atk. 208; 1 Term Rep. 772; *Wilmot*, 218.

(*a*) *Stephens v. Medina*, 3 Gale & Dav. 110.

(*b*) 3 Hare, 25.

(*c*) *Seward v. Willock*, *ubi sup.*; S. P. ruled by Lord Ellenborough, C. J. in *Lowndes v. Bray*, Sitt. after T. T. 1810. See 11 Adol. & Ell. 933.

(1) A different rule prevails in many of the United States. In Massachusetts, a party who contracts to execute and deliver a deed, is bound to prepare the deed, if there be no stipulation that it shall be prepared by the intended grantee. *Tinney v. Ashley*, 15 Pick. 546. "If the law in England, is otherwise," said Mr. Justice Wilde, "it must be founded on custom and practice, and not on any legal principle, independent of practice." *ib.* 552. See *Swan v. Drury*, 22 Pick. 485. The rule in Maine agrees with that in Massachusetts. *Hill v. Hobart*, 16 Maine, 164. In New York the vendor who has bound himself to give a deed by a certain day, must be at the expense of having it drawn, and must have it prepared and ready on that day. *Connelly v. Pierce*, 7 Wendell, 129; *Carpenter v. Brown*, 6 Barbour Sup. Ct. Rep. 93. See *Hackett v. Huson*, 3 Wendell, 250; *Fuller v. Hubbard*, 6 Cowen, 13, 18 and note; *Hudson v. Swift*, 20 John. 23, 27. In Pennsylvania the rule is the same, viz. that the vendor must prepare and tender the deed. *Sweitzer v. Hummel*, 3 Serg. & R. 228. So in Mississippi, *Standifer v. Davis*, 13 Smedes & Marsh. 48. See *Smith v. Henry*, 2 English, 207; *Buckmaster v. Grundy*, 1 Scammon, 310. In Arkansas the purchaser must prepare and tender a deed and bear the expense of it, according to the English rule. *Byers v. Aiken*, 5 Pike, 419; *Drennere v. Boyer*, 5 Pike, 497. See *Wade v. Killough*, 5 Stew. & Port. 450.

citated himself from executing a conveyance to the first purchaser, that renders further expense and trouble on his part unnecessary; and he may accordingly sustain an action without tendering a conveyance, or the purchase-money (*d*) (1).

68. Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title, it is doubtful whether an action will, under any circumstances, lie against the purchaser (1). It is *settled that the action will not lie where the occupation has not been beneficial to him (*e*), beyond the mere protection from the inclemency of the weather, and if he paid the money, of which the seller might have made interest, although the jury expressly find that the value of the house, during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover (*f*); for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction: one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation (2).

(*d*) Knight v. Crockford, 1 Esp. Ca. Bing. N. C. 869.

189. See Duke of St. Alban's v. Shore, (*e*) Hearne v. Tomlin, Peake's Ca. 192.

1 H. Black. 270; Jackson v. Jacob, 3 (*f*) Kirtland v. Pounsett, 2 Taunt. 45.

(1) See *supra*, s. 1, for the effect of a contract on an existing tenancy.

(1) Newcomb v. Brackett, 16 Mass. 161; Eames v. Savage, 14 Mass. 425. Where the vendee has given notice to the vendor of his refusal to perform the contract, no tender of a deed by the vendor is necessary in order to sustain a bill for specific performance. Cray v. Smith, 2 Comstock, 60.

(2) If one enter on land under a contract for a deed, the relation of landlord and tenant does not exist; and on his refusing to perform the contract, or on the owner's neglecting to execute a deed, he is not liable, in assumpsit, for use and occupation. Smith v. Stewart, 6 John. 46; Vanderheuvell v. Storrs, 3 Conn. 203; Bell v. Ellis, 1 Stew. & Port, 294; Little v. Pearson, 7 Pick. 301; Jones v. Tifton, 2 Dana, 295; Brewer v. Craig, 3 Harr. 214; Hough v. Birge, 190; Doe v. Cockran, 1 Scammon, 209. But see Clough v. Hosford, 6 N. Hamp. 234; Ayer v. Hawkes, 11 N. Hamp. 148; Davidson v. Ernest, 7 Alabama, 817; Gould v. Thompson, 4 Metcalf, 224.

In Clough v. Hosford, 6 N. Hamp. 234, it was held, that a vendee let into possession and afterwards refusing to comply with his agreement to purchase, may be sued in trespass, or for use and occupation, for the profits of the land, at the owner's election. In Smith v. Stewart, 6 John. 46, it is said that the vendee, in such case, is liable to be turned out, as a trespasser, and is responsible, in that character, for the *mesne* profits, but cannot be sued for use and occupation. In another case, decided in New Hampshire, the facts were that the defendant, in the month of May, 1838, made a verbal contract with the plaintiff, for the purchase of a farm, for the sum of \$1200. It was agreed that \$200 or \$300 of the purchase money should be paid when he should take possession; \$500 in the ensuing summer, and the remainder in two years. The defendant took possession, and paid the plaintiff \$200, for which the plaintiff gave him a receipt, stating

69. But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit (*g*) ; unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like ; in which case an ejectment will lie, without notice, on non-performance of his agreement (1). The agreement operates in the same manner as a clause of re-entry on breach of covenant in a lease (*h*).

70. If possession be given upon payment of part of the purchase-money, and interest is paid upon the remainder, twenty years' possession by the purchaser is no bar in ejectment, because his possession was not adverse to the seller (*i*) (2).

71. Where the conditions of sale stipulated for the delivery of an abstract, &c. by the sellers, and that in case the purchaser was let into possession before the payment of his purchase-money, he should be considered as tenant at will to the vendors, and pay interest after the rate of four per cent. upon the amount of his purchase-money, as and for such rent—the seller made default in

(*g*) *Doe v. Jackson*, 1 Barn. & Cress. 448 ; *Right v. Beard*, 13 East, 210. See *Hegan v. Johnson*, 2 Taunt. 148 ; *Doe v. Lawder*, 1 Stark. 308 ; *Doe v. Boulton*, 1 Mood. & Malk. 148 ; *Doe v. Waller*, 1 Carr. & Payn. 595 ; *Doe v. Miller*, 5 Carr. & Payn. 595 ; *Doe v. Pullen*, 2 Bing. N.

C. 749 ; *Doe v. Stanion*, 1 Mees. & Wels. 695.

(*h*) *Doe v. Sayer*, 3 Camp. Ca. 8. The same doctrine is extended to an agreement for a lease, *Doe v. Smith*, 6 East, 530 ; *Doe v. Breach*, 6 Esp. Ca. 106.

(*i*) *Doe v. Edgar*, 2 Bing. N. C. 498 ; see ch. 11, s. 5, *post*.

that it was in part payment for the land. The defendant took the crops for 1833, but failing to make any further payment, the plaintiff notified him to quit, and he removed from the place in the month of December. The plaintiff then brought an action for use and occupation, and the defendant filed the sum of \$200, which he had paid the plaintiff, by way of set-off. The set-off was not allowed, because the defendant had neglected to complete the contract, by paying or tendering the instalment when it became due ; and it was also held that the plaintiff could not recover, without paying the defendant the money he had received under the contract. *Ayer v. Hawkes*, 11 N. Hamp. 148. In *Gould v. Thompson*, 4 Metcalf, 224, it appeared, that an oral agreement had been made for the purchase of a house, and the vendee advanced the purchase money and took possession, but before he obtained a deed, the house was destroyed by fire, and he thereupon vacated possession of the land, refused to accept a deed which the vendor tendered to him immediately after the fire, and commenced a suit against the vendor, in which he recovered back the purchase money, as appears in *Thompson v. Gould*, 20 Pick. 124, and it was thereupon held, that the vendee, during his occupation of the house, was tenant at will, and that he was liable to the vendor, in an action of assumpsit, for use and occupation ; and, it was also held, that the vendee, by refusing to accept a deed from the vendor, determined the tenancy at will, and was no longer liable to him for use and occupation.

(1) See *Clough v. Hosford*, and *Smith v. Stewart*, cited in the preceding note.

(2) *Jackson v. Camp*, 1 Cowen, 610 ; *Jackson v. Bard*, 4 John. 230 ; *Kellogg v. Kellogg*, 6 Barbour Sup. Ct. Rep. 116, 128 ; *Jackson v. Johnson*, 5 Cowen, 74 ; *Cooper v. Stower*, 9 John. 331.

delivering of the abstract, and the purchaser was let into possession—it was held, 1. That in the absence of an express contract by the purchaser to waive the non-fulfilment of the condition to deliver an abstract, no such contract could be implied at law, from the mere circumstance of the purchaser being let into possession : *the remedy was to be sought in equity.—2. That use and occupation would not lie, for the condition under which the purchaser was said to have occupied, supposed that the vendors would have performed their parts of the previous contract, and provided for the case of default after such performance : the law would not imply that the vendee had subjected himself to such a condition by being let into possession while the title remained uncertain.—3. That if the purchaser had agreed to be bound by the condition, the action ought not to have been for use and occupation, but the declaration should have been special on the contract to pay four per cent. upon the purchase-money, a contract in the nature of an agreement for a tenancy, but not amounting to that (*k*) (1).

72. And in a case where power was given, in a contract under seal, to a purchaser to leave the purchase-money as a charge upon the property for a given period at interest, and it was stipulated that the purchaser should be deemed tenant to the seller at a rent equal to the interest, and the seller was to have power to distrain, though the agreement was acted upon, yet the instrument was held not to be a lease, but substantially a contract for purchase, and that the power of distress did not alter the nature of the contract between the parties. And this construction was held to prevail even in the event of the bankruptcy of the purchaser (*l*).

73. A writ of *ne exeat regno* lies against the purchaser who has not paid the purchase-money, upon his threatening to go abroad, if the vendor's title has been accepted (*m*), or there has been a decree for a specific performance after the title has been investigated (*n*). But although the purchaser has taken possession of the property, and received the rents after the delivery of the ab-

(*k*) *Seaton v. Booth*, 4 Adol. & Ell. 528, where the purchase was in lots, and the sellers had not a joint title. The statement in the text is from the judgment of Mr. Justice Littledale; see the opinions of the L. C. J. and Mr. Justice Coleridge.

(*l*) *Hope v. Booth*, 1 Barn. & Adol. 498.

(*m*) *Goodwin v. Clarke*, 2 Dick. 497; and *Anon. ibid.* note; see *Jackson v. Petrie*, 10 Ves. jun. 164.

(*n*) *Boehm v. Wood*, Turn. & Russ. 332.

tract, yet the writ cannot issue ; for unless the Court can make it out to be quite clear that there must be a specific performance, it cannot grant the writ (o) (2).

(o) *Morris v. M'Neil*, 2 Russ. 604.

(1) 3 Daniell Ch. Pr. (Perkins's ed.) 1929, 1930 ; *Brown v. Haff*, 5 Paige, 235 ; *Gibbs v. Meraud*, 2 Edwards, 482 ; *Cowdin v. Cram*, 3 Edwards, 231 ; *De Rifanoli v. Corsetti*, 4 Paige, 264.

*SECTION V.

OF RESCINDING AND OF CONFIRMING A CONTRACT.

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| 1. <i>Notice of rescinding.</i> | 33. <i>Although new circumstance of fraud discovered.</i> |
| 3. <i>Doctrine of rescinding a contract.</i> | 34. <i>Acquiescence where fraud and oppression.</i> |
| 5. <i>Concealment of a fact by a purchaser.</i> | 35. <i>Confirmation where fraud.</i> |
| 6. <i>Dealing unduly with purchaser.</i> | 37. <i>Whether fraudulent transaction can be purged.</i> |
| 7. <i>Misrepresentation by a purchaser.</i> | 39. <i>Requisites to valid confirmation.</i> |
| 8. <i>Whether fraud be necessary.</i> | 43. <i>Time a bar to relief.</i> |
| 9. <i>Seller believing his own misrepresentation.</i> | 45. <i>Statutory bar.</i> |
| 10. <i>Party left to his remedy at law.</i> | 47, 56, 57. <i>Profit and loss by stock : interest.</i> |
| 12. <i>Rescinding a conveyance for unreasonableness of price.</i> | 49. <i>Purchaser, how charged.</i> |
| 13. <i>For inadequacy.</i> | 50. <i>Occupation rent : improvements.</i> |
| 14. <i>Because trustee sold to himself.</i> | 51. <i>Not interest upon interest.</i> |
| 15. <i>Where by mistake a man bought his own estate.</i> | 53. <i>Repairs after notice of defect in title.</i> |
| 16. <i>Because improvidently made.</i> | 54. <i>Conversion of shop into private house.</i> |
| 19. <i>Because defect in title concealed.</i> | 56. <i>Power of Court where bill is dismissed.</i> |
| 20. <i>Eviction not necessary to relief.</i> | 59. <i>After an injunction : interest.</i> |
| 21. <i>Because remainder sold had been barred.</i> | 61. <i>Re-transfer of sums after reversal of decree.</i> |
| 22. <i>Action of deceit.</i> | 62. <i>No interest upon costs.</i> |
| 23. <i>Dobell v. Stevens.</i> | 63. <i>Power of Court after reversal, and cause remitted.</i> |
| 25. <i>Fuller v. Wilson.</i> | 64. <i>Whether purchase money can be followed.</i> |
| 27. <i>Rule in equity.</i> | |
| 28. <i>Purchaser's general remedy.</i> | |
| 29. <i>Acquiescence bars right.</i> | |
| 32. <i>Confirmation releases right.</i> | |

1. WHERE one party fails in performing the contract, the other,
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if he mean to rescind it, should give a clear notice of his intention (*a*).

2. The right to rescind a contract arises either before the completion of it—as for the want of title, for example—or after the contract is completed. The first class of cases we have already considered generally (*b*), and we have now only to inquire in what cases a party may require a contract to be delivered up; and, 2dly, under what circumstances a party may rescind the contract after the execution *of the conveyance (*1*). And, first, as to the delivering up of contract.

3. Few cases, Lord Eldon observed, turn on greater niceties than those which involve the question whether a contract ought to be delivered up to be cancelled, or whether the parties should be left to their legal remedy (*c*).

4. Where representations are made with respect to the nature and character of the property which is to become the subject of purchase, affecting the value of that property, and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action to recover damages for the deceit so practiced; and in a court of equity a foundation is laid for setting aside the contract which was founded upon a fraudulent basis (*d*) (*2*).

5. Where a man, knowing of the death of a person, by whose death the value of the property in the hands of assignees of a bankrupt was improved, purchased the property, and did not disclose

(*a*) *Reynolds v. Nelson*, 6 Madd. 18.

(*b*) *Vide supra*, s. 4.

(*c*) *Jac.* 172.

(*d*) *Attwood v. Small*, 6 Cl. & Fin. 395, *per* Lord Lyndhurst; see also p. 444, 445, 466, 478, 502.

(1) See *Taylor v. Fleet*, 4 Barbour Sup. Ct. Rep. 95.

(2) A bargain, founded upon a material misrepresentation of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by the mistake of the grantors alone, will be annulled in equity. Mistake, as well as fraud, in any representation of a fact material to the contract, furnishes a sufficient ground, in equity, to set it aside and declare it a nullity. *Daniel v. Mitchell*, 1 Story C. C. 172; *Doggett v. Emerson*, 3 ib. 700; *Hough v. Richardson*, ib. 659; *Warner v. Daniels*, 1 Woodb. & Minot, 90; *Smith v. Babcock*, 2 ib. 246; *Tuthill v. Babcock*, ib. 298; 1 Story Eq. Jur. §140 et seq.; *Fonbl. Eq. B.* 1, Ch. 2, §7 and notes; *Mason v. Crosby*, 1 Woodb. & Minot, 312; ante, Introduction, §1 to 33 and notes; *Pearson v. Morgan*, 3 Brown Ch. 388; *Rosevelt v. Fulton*, 2 Cowen, 134; S. C. 5 John. Ch. 174; *Lewis v. McLenore*, 10 Yerger, 206; *Champlin v. Laytin*, 6 Paige, 189; S. C. 13 Wendell, 407; *M'Adoo v. Sublett*, 1 Humph. 105; *Parham v. Randolph*, 4 How. (Miss.) 435; *Brooks v. Stolley*, 3 McLean, 523; *Ferson v. Sanger*, 1 Woodb. & Minot, 138; *Sherwood v. Salmon*, 5 Day, 439; *Coe v. Turner*, 5 Conn. 86.

the fact, and they were unaware of it, although it was publicly known, Lord Eldon ordered the contract to be delivered up (*e*) (1).

6. In a case (*f*) where, pending the investigation of a point upon the title to a part of the estate, the seller and his solicitor, in the absence of the purchaser's solicitor, went to the purchaser and induced him to pay the purchase-money, and to execute two deeds of covenant for the production of title-deeds to the estate, which were not in his possession, and the seller gave him a written acknowledgment for the money, which he undertook to return in case the title to the premises should not be complete; the purchaser's solicitor disapproved of this proceeding, and the seller then insisted that the purchaser had accepted the title. The Court held, that a case of fraud had been established against the seller; and as the seller had retained the money and the deeds of covenant after the objection made by the purchaser's solicitor, and had put his defence upon the acceptance by the purchaser of the title, and three years had elapsed since the bill was filed, the purchaser was entitled to have the contract rescinded without reference to the validity of the objection to the title, or to what part of the estate the objection applied. The seller was ordered to repay the purchase-money with interest, and to repay the auction-duty paid by the purchaser, and also to pay all costs, charges, and expenses *which had been incurred by the purchaser in consequence of and incident to the purchase and the costs of the suit (*g*).

7. In the great case of *Small v. Attwood* (*h*), which from its complicated facts can hardly perhaps be cited as an authority for anything beyond the general principle, that in the absence of actual fraud, representations and assertions upon a treaty are concluded by a contract in which no notice is taken of them, the learned Judge who decided the case in the first instance considered that there was a mis-statement of the basis of the agreement; there was a mis-statement with the knowledge of the party, and therefore it came within the principle, that if a case of deception is made out, which would entitle the purchaser to recover for a deceitful misrep-

(*e*) *Turner v. Harvey*, Jac. 169; see *post*. See *Jones v. Keene*, 2 Mood. & Rob. 348.

(*g*) See accordingly, *Edwards v. M'Leay*, Coop. 318.

(*h*) *You.* 407; 3 *You. & Coll.* 105, (*f*) *Berry v. Armistead*, 2 *Kee.* 221. *infra*.

(1) But where a person, with knowledge that a tract of land contained a valuable mine, purchased the land, without disclosing the existence of the mine, it was held that such concealment did not avoid the contract. *Smith v. Beatty*, 2 *Iredell Ch.* 456.

resentation, it is a ground in a court of equity, to which an application may be made to set aside a contract (*i*) (1); but the House of Lords came to a different conclusion, and dismissed the purchaser's bill with costs (*k*).

8. Unless a clear fraud be established, there ought to be no relief in equity, for there is a great difference between establishing and rescinding an agreement (2). In *Small v. Attwood*, for example, it was not too much to expect that if, in a purchase of such magnitude, in which of course there was previous inquiry, the purchasers bought on the representations of the seller as to the costs of producing pig iron, they should have required him to bind himself *by the contract* to those representations, and to agree to reduce the purchase-money if they proved to be incorrect. Such a simple precaution would have prevented the vast litigation in that case; but it is clear that if such a demand had been made, it would not have been acceded to, and that if it had been refused, the purchasers would have executed the contract without it.

9. At law, upon a sale of chattels—pictures for example—where there is no express warranty, but only a representation, the seller will not be answerable, although the representation prove to be untrue, if he believed it to be true (*l*) (3).

10. There are cases, as we have already seen, in which, in dismissing a bill for a specific performance, the decree is expressly made without prejudice to the plaintiff's remedy at law upon the contract. In *Mortlock v. Buller* (*m*), where Lord Eldon refused a specific performance to the purchaser, who was plaintiff, he *observed that there was nothing in the circumstances which could induce him to think the plaintiff could be restrained from using all the remedies he might have at law if a bill had been filed [by the seller] to have the contract delivered up. It was much too late to discuss then whether a court of equity ought to order a contract that it would not specifically perform to be delivered up, and to decree the performance of a contract which it would not order to

(i) See *You.* 487, 462, 463; and see *Lovell v. Hicks*, 2 *You. & Coll.* 51.

(k) 6 *Cl. & Fin.* 232. See 8 *Cl. & Fin.* 650, 651.

(l) *De Sewhanberg v. Buchanan*, 5 *Carr. & Payn.* 343.

(m) 10 *Ves. jun.* 308; *Day v. Newman*, 2 *Cox*, 77.

(1) See *Hough v. Richardson*, 3 *Story C. C.* 659, 690.

(2) See *Buck v. Sherman*, 2 *Douglass*, 176; *Beebe v. Swartwout*, 3 *Gilman*, 162.

(3) *Stone v. Denny*, 4 *Metcalf*, 151; *Hammatt v. Emerson*, 27 *Maine*, 308. But where the vendor makes an untrue representation as of his own knowledge, not knowing whether it is true or false, he will be answerable. *Stone v. Denny*, *Hammatt v. Emerson*, *ubi supra*; *Hazard v. Irwin*, 18 *Pick.* 95.

be delivered up, for the distinction was always laid down, that there are many cases in which the party has obtained a right to sue upon the contract at law, and under such circumstances, that his conscience cannot be affected in equity so as to deprive him of that remedy; and yet, on the other hand, the Court declaring he ought to be at liberty to proceed at law, will not actively interpose to aid him, and specifically perform the contract.

11. So in *Cadman v. Horner* (*n*), where Sir W. Grant refused a purchaser a specific performance on account of a slight misrepresentation by him, he observed, that this was not a case where the Court was called upon to rescind an agreement, and to decree the conveyance executed in pursuance of it to be delivered up to be cancelled, which would admit a different consideration (*l*).

12. Secondly. We have elsewhere shown that there are few cases in which a purchaser can rescind a contract after the conveyance is executed, and the purchase completed, on account of the price being unreasonable (*o*).

13. Nor, on the other hand, can the vendor easily obtain relief on account of the inadequacy of the consideration after the conveyance is executed (*p*) (*2*).

14. A *cestui que trust*, whose trustee has sold the estate to himself, may rescind the sale; but this subject is fully discussed in a subsequent part of this work (*q*) (*3*).

15. Where a man having a right to an estate, purchased it of another person, being ignorant of his own title, the vendor was compelled to repay the purchase-money, with interest from the time of filing the bill, and costs; for the report says, though no fraud appeared, and the defendant apprehended he had a right, yet there was a plain mistake such as the Court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right (*r*) (*4*). It has been said that if it were necessary to consider

(*n*) 18 Ves. jun. 10.

(*q*) See ch. 19.

(*o*) See ch. 6.

(*r*) *Bingham v. Bingham*, 1 Ves. 126.

(*p*) Ch. 6.

(1) *Taylor v. Fleet*, 4 Barbour Sup. Ct. Rep. 102. See 2 Kent (6th ed.) 487; *Seymour v. Delancey*, 6 John. Ch. 222; *Osgood v. Franklin*, 2 John. Ch. 23, 24; *White v. Damon*, 7 Vesey, 30 and note.

(2) "But an entire failure of consideration in the receipt of what is mere moonshine," says Mr. Justice Woodbury, "is often sufficient to rescind a contract." *Warner v. Daniels*, 1 Woodb. & Minot, 110; *Hardeman v. Burge*, 10 Yerger, 202; *Fripp v. Fripp*, Rice Eq. 84.

(3) *Fox v. Macreth*, 2 Bro. C. C. (Perkins's ed.) 400, 425, note (c) and cases cited; S. C. White's *Leading Cases in Equity*, 72 et seq. and notes.

(4) Ante, 267 note.

the principle of that decree, it might not be easy to distinguish that *case from any other purchase, in which the vendor turns out to have had no title. In both there is a mistake, and the effect of it in both is that the vendor receives and the purchaser pays money without the intended equivalent (*s*).

The facts, as they appear in the registrar's book, are shortly these (*t*) ; John Bingham devised an estate tail in certain lands to Daniel, his eldest son and heir, with the reversion in fee to his (the testator's) own right heirs. Daniel left no issue, but devised the estate to the plaintiff in fee. The bill stated that the latter being ignorant of the law, and persuaded by the defendant and his scrivener and conveyancer that Daniel had no power to make such devise, and being also subjected to the action of ejectment, purchased the estate of the defendant for 80*l.*, and it was conveyed to him by lease and release. The bill was to have the money repaid with interest. The defendant, by his answer, insisted that Daniel had no power to make such devise, but if he had, then he insisted that the plaintiff should have been better advised before he parted with his money, for that all purchases are to be at the peril of the purchaser.

16. Lord Redesdale observed, that if it were clear that a man had the fee simple, and that fraud, or perhaps mere ignorance, had induced him to accept a lease from another person, the Court might control the setting up of the lease : in a case of fraud it certainly might ; in a case of mere ignorance, though he inclined to think it might, yet after looking a little into the subject, he found great difficulty in holding that a court of equity would interfere (*u*).

17. The authorities certainly are not easily to be reconciled on this head, although there are several in which relief has been given on the mere ground of mistake as between parties not standing in the relation of vendor and purchaser (*v*) (1).

18. In a case where a devisee under a tenant in tail, who had not barred the entail, obtained a conveyance from the heir at law, a poor man, who upon being sent for by a friend of the family, in company with a solicitor, agreed to convey to the devisee for

(*s*) *Stewart v. Stewart*, 6 *Cla. & Fin. Scho. & Lef.* 101.
968.

(*t*) *Reg. Lig.* 1748, *A.* fol. 154.

(*u*) *Saunders v. Lord Annesley*, 2, 171 ; and see 2 *Mer.* 233.

(*v*) *Lansdown v. Lansdown*, *Mose.*
361 ; *Leonard v. Leonard*, 2 *Ball. & Beat.*

(1) See 1 *Story Eq. Jur.* §116 et seq.

200*l.*, but did not know the value of the estate, nor that the devise was void, and afterwards conveyed, there having been time for deliberation, Lord Kenyon, Master of the Rolls, upon a bill to set aside the conveyance, as obtained by fraud and imposition, observed, that no case had been cited, and therefore the case before *him must stand upon its own circumstances, which were such as did not, in his opinion, amount to a proof of fraud and imposition. If the plaintiff after the offer had gone home and consulted his friends, and had afterwards accepted it, and joined in the conveyance, he thought he ought not to be relieved; but from its being suddenly accepted, without further inquiry or information, the conveyance ought to be set aside as improvidently entered into, and therefore decreed for the plaintiff (*w*) (1).

19. In a modern case, where the sellers knew of a defect in the title to a part of the estate, which was material to the enjoyment of the rest, and did not disclose the fact to the purchaser, and it could not be collected from the abstract, the purchaser was relieved against the purchase in equity. The sellers were decreed to repay the purchase-money, with costs, and likewise all expenses which the purchaser had been put to relative to the sale, together with an allowance for any money he laid out in repairs during the time he was in possession (*x*). This is a case of the first impression.

Sir W. Grant observed, that the bill was rather of an unusual description. It could not certainly be contended that, by the law of this country, the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase-money. By our law the vendor is, in general, liable only to the extent of his covenants; but it had never been laid down that, on the subject of title, there could be no such misrepresentation as would give the purchaser a right to claim a relief to which the covenants do not extend. Whether it would be a fraud to offer as good a title which the vendor knew to be defective, it was not necessary to determine; but if he knows and conceals a fact material to the validity of the title, he was not aware of any principle on which relief could be refused to a purchaser.

(*w*) *Evans v. Llewellyn*, 2 Bro. C. C. 150; the distinction is not very satisfactory.

(*x*) *Edwards v. McLeay*, Coop. 308; affirmed by Lord Eldon on appeal, 11 July 1818, with a reservation of the

question as to repairs, MS. S. C. 2 Swanst. 287. See *Pike v. Vigors*, 2 Dru. & Walsh, 258; *Attwood v. Small*, 6 Cl. & Fin. 332; *Gibson v. D'Este*, 2 You. & Coll. C. C. 542.

(1) See *Segur v. Tingley*, 11 Conn. 134; 1 Story Eq. Jur. §251.

Lord Eldon affirmed the decision upon appeal; he observed, that the case resolved into this question, whether the representation made to the plaintiff was not in the sense in which we use the term fraudulent. He was not apprised of any such decision, but he agreed with the Master of the Rolls, that if one party makes a representation which he knows to be false, but the falsehood of which the other party had no means of knowing, the Court will rescind the contract (*y*).

*20. Where a purchaser is entitled to be relieved on the ground of concealment of a fact establishing the invalidity of the title, it is not important that he has not been evicted: if the rightful owner is not barred by adverse possession, though he may never assert his right, the purchaser cannot be compelled to remain during the time to run in a state of uncertainty whether, on any day during that period, he may not have his title impeached (1). A court of equity is bound to relieve a purchaser from that state of hazard into which the misrepresentation of the seller has brought him (*z*).

21. Where a person sold a remainder expectant upon an estate-tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the purchaser was relieved against a bond which he had given for the purchase-money, and the seller was compelled to repay the interest which he had received (*a*). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions; he said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time (*b*). Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land so sold to sell (*c*)?" Both these cases, when they arise, will, it is apprehended, deserve great consideration before

(*y*) 2 Swanst. 287.

(*z*) *Edwards v. M'Leay*, Coop. 308.

(*a*) *Hitchcock v. Giddings*, 4 Price,

135. [See the remarks upon this case in *Bates v. Delavan*, 5 Paige, 307.]

(*b*) But see 2 Cro. 196; 2 *Ld. Raym.*

1118; 1 *T. Rep.* 755; 2 *Freem.* 106; and

post, ch. 12.

(*c*) See ch. 6, *post*.

(1) See 2 Kent, (6th ed.) 471 et seq.; *Feemster v. May*, 13 *Smedes & Marsh.* 275; *Wiggins v. McGimpsey*, ib. 532; *Sage v. Ranney*, 2 *Wendell*, 534.

they are decided in the purchaser's favor. The decision must be the same, whether the money is actually paid or only secured. Lord Eldon, in a later case, expressed considerable doubts as to the doctrine in this case (1).

22. Although as we have seen, the treaty for a contract is considered to be concluded by the terms of the contract itself, and they cannot be added to at all at law by parol evidence, nor even in equity, except as a defence, yet it is laid down that, where a misrepresentation of a material fact not within the observation of the opposite party is made, the person making the representation, knowing at the time that his statements are untrue, under such circumstances an action may be maintained at law for the purpose of *recovering a compensation in damages for the injury the party has sustained, notwithstanding the contract was in writing, and notwithstanding those particulars may be no part of the terms of the written contract (d).

23. As an instance, we may refer to *Dobell v. Stevens* (c), where a purchaser was allowed to recover upon an action on the case for a deceitful representation of the trade and income of a public house, although the purchase had been concluded by the payment of the purchase-money and the assignment of the property. There was negligence, too, on the part of the purchaser, for the seller's books were in the house at the time of the treaty, and might have been inspected by the purchaser, and they would have shown the real state of the concern, but the purchaser did not examine them. The Court, upon a motion for a new trial, relying on the early case of *Lysney v. Selby* (f), observed, that the purchaser relied upon the assertion of the seller, and that was his inducement to make the purchase. The representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it.

24. Where the purchaser has a right to rescind the contract, he

(d) *Per* Lord Lyndhurst, C. B., *You.* 461, 462.

(e) 3 *Barn. & Cress.* 623; *Pilmore v. Hood*, 5 *Bing. N. C.* 97; 6 *Scott*, 827. A false and fraudulent statement by the

seller, communicated by an intended purchaser to a substituted purchaser, gives the latter a right of action. See *Attwood v. Small*, 6 *Cl. & Fin.* 232.

(f) 2 *Lord Raym.* 1118; *supra* p. 4.

(1) The case of *Hitchcock v. Giddings*, was cited with approbation in *Allen v. Hammond*, 11 *Peters*, (S. C.) 63, 72. In this last case it was said, *arguendo*; if a life estate in land is sold, and at the time of the sale, the estate is terminated by the death of the person in whom the right vested, a court of equity would rescind the purchase. If a horse is sold, which both parties believed to be alive, the purchaser would not be compelled to pay the consideration. See *Hammond v. Allen*, 2 *Sumner*, 387; 2 *Kent*, (6th ed.) 468, 469.

may bring an action for money had and received to recover the purchase-money (*g*).

25. In *Fuller v. Wilson* (*h*), the facts were considered to be that the seller being the owner of a house in the city, employed her attorney to put it in the course of being sold by auction. *He described it to the auctioneer as being free from rates and taxes*, and it was bought by the plaintiff on that representation for more than its value. The action by the purchaser was on the case for a fraudulent misrepresentation of the value. But the seller had made no representation at all, and her attorney who made it did not know it to be false. The Court of King's Bench held that the action would lie, for whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. The principal and his agent are for this purpose identified; and the question is not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them. The agent was not indeed instructed to make any *representation specifically on the subject of rates and taxes, but he could not sell the house without describing it, and he described it untruly in an essential point. By this false statement the plaintiff was induced to part with his money to the defendant, who could not be allowed to retain it.

This decision wholly depended upon the false statement by the agent. But upon error in the Exchequer Chamber upon a special verdict by consent, it appeared that the purchaser was the auctioneer employed to sell the property, that the seller referred her attorney for information to a person who had a lien on the property, and who told him that the rent was 100*l.* a year. The attorney made no inquiry about rates and taxes, assuming that the tenant paid them, and he did not know that they were paid by the seller. The seller herself did not further interfere. The attorney stated to the auctioneer that "the house was let at 100*l.* a year." The auctioneer in his particulars stated the rent to be clear of rates and taxes. The attorney did not correct this statement, as he thought it true: indeed it did not appear on the verdict *when* he saw the particulars. Upon these facts, therefore, it appeared, 1st. that the purchaser himself was an agent; 2d. that the seller, the principal, made no representations; 3d. that the attorney made no mis-

(*g*) *Greville v. Da Costa*, Peake's Add. Ca. 113; *supra*, s. 4, pl. 37.

(*h*) 3 Adol. & Ell. N. S. 58.

representation, and believed the statement in the particulars to be correct, and it was held that the action would not lie (*i*).

26. It was not doubted in the Exchequer Chamber that the representation made by the agent, if fraudulent, would have bound the seller, and that a fraudulent concealment by him would have equally bound her (*j*). It was not found that the seller knowing a material fact, kept it back (*k*). If she had knowingly referred to an ignorant agent, that would have been fraud (*l*). The Court considered the immediate cause of the injury sustained by the purchaser to have arisen from his own misapprehension of the fact, and not from any misrepresentation or concealment on the part of the defendant (*m*).

27. It has been considered to follow from the authorities at law, that in a court of equity a party would be entitled to come forward for the purpose of obtaining redress, in order to get rid of a contract founded on fraudulent representations (*n*). But perhaps this rule is too broadly laid down. Cases may occur where a purchaser might recover damages at law for a false representation, and yet be prevented by his own conduct from rescinding the contract *in equity, and the relief in equity can only be to rescind the contract. Damages or compensation must be sought at law. In equity, after the contract is executed by payment of the money and a conveyance, a bill cannot be filed for a compensation (*o*) (1).

28. Generally speaking, a purchaser after a conveyance has no remedy, except upon the covenants he has obtained, although evicted for want of title; and however fatal the defect of title may be, if there is no fraudulent concealment on the part of the seller, the purchaser's only remedy is under the covenants (*p*).

29. We may now observe that a right to rescind a contract may, like most other rights, be lost by acquiescence, or relinquished by confirmation (*q*) (2). A party may, of course, by his

(*i*) 3 Adol. & Ell. N. S. 68.

(*j*) *Ib.* p. 77. See *Earby v. Garrett*, 4 Mann. & Ry. 687; *Stainbank v. Fernley*, 9 Sim. 556.

(*k*) 3 Adol. & Ell. N. S. 74.

(*l*) *Ib.* p. 75.

(*m*) 5 Adol. & Ell. N. S. 1009.

(*n*) See *You.* 402, *supra*; p. 268.

(*o*) *Lenham v. May*, 13 Price, 749.

(*p*) *Vide* ch. 12, *post*,

(*q*) *Attwood v. Small*, 6 Cl. & Fin. 232. See p. 424, 432.

(1) See ante, 253, in note.

(2) See *Fonbl. Eq. B. 1, Ch. 2, §13* and notes; 1 *Story Eq. Jur.* §345 and notes; *Gwynne v. Heaton*, 1 *Brown C. C.* (Perkins's ed.) 3, and cases in note (†); *Sadler v. Robinson*, 2 *Stewart*, 520. Where a party intends to abandon or rescind a contract, on the ground of a violation of it by the other party, he must do it promptly and decidedly, on the first information of such breach. If he negoti-

conduct abandon or reject an agreement into which he has entered, and so prevent his claiming the benefit of it (*r*).

30. And a seller, having a right to rescind a contract if interest on the purchase money be not duly paid, may of course bind his right by enlarging the time, upon an advance of the interest by a third party (*s*).

31. So if there be a condition that the purchaser shall state his objections to the title within a limited period, and that if the seller shall not be able or willing to remove them, the seller may rescind the contract, that would give to the seller the option expressed; but if the seller express a willingness to remove the objections, he makes his option not to take advantage of the condition, and he cannot, at any time afterwards, rescind the contract (*t*).

32. If a party with full information freely confirms a contract, which he was at liberty to rescind, he will be bound by it, and no new consideration is requisite to give validity to the confirmation (*u*).

33. If a purchaser, instead of repudiating the transaction, deal with the property as his own, he is bound, although he afterwards discover a new circumstance of fraud, for that can only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived (*x*).

*34. But where the contract itself is founded in fraud or oppression from the nature and terms of it, with which of course the party is from the first aware, acquiescence whilst he is under the same difficulty and embarrassment as he was at the time of the transaction, will not of itself bar his right to relief (*y*).

35. It has been said that where the original transaction is fraudulent, and the fraud is clearly established by circumstances

(*r*) *Morris v. Timmins*, 1 Beav. 411.

(*s*) See *Dawson v. Yates*, 1 Beav. 301.

(*t*) *Tamer v. Smith*, 10 Sim. 410;
Cutts v. Thodey, 13 Sim. 206.

(*u*) *Chesterfield v. Janssen*, 2 Ves. 146,
149, 152, 158, 159; *Roche v. O'Brien*, 1
Ball & Beat. 355; *Cole v. Gibbons*, 3 P.

Wms. 290; *Morse v. Royal*, 12 Ves. jun.
355.

(*x*) *Campbell v. Fleming*, 1 Adol. &
Ell. 40; 3 Nev. & Mann. 834.

(*y*) *Wood v. Downes*, 18 Ves. jun.
130; *D'Arcy v. D'Arcy*, 1 Hay. & Jon.
115.

ates with the other party, after knowledge of the breach, it is a waiver of his right to rescind the contract. *Lawrence v. Dale*, 3 John. Ch. 25; *M'Neven v. Livingston*, 17 John. 437. A party cannot claim a rescission of a contract for fraud, after entering into new stipulations concerning it, with a full knowledge of the fraudulent circumstances. *Sadler v. Robinson*, 2 Stewart, 520. See also *Royster v. Shackelford*, 5 Little, 229; *Vail v. Nelson*, 4 Rand, 478; *Mayo v. Pureell*, 3 Munf. 243; *Stockton v. Cook*, 3 Munf. 68.

not liable to doubt, a confirmation of such a transaction is said to be so inconsistent with justice, so unnatural, so likely to be connected with fraud, that it ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction, the effect of which is to ratify that which in justice ought never to have taken place (z).

36. In one case, where the original purchase from an expectant heir was deemed fraudulent, it was set aside, notwithstanding letters from the seller after the estate fell into possession, recognizing the transaction, and that a bill filed to be relieved had been dismissed without further proceedings, and a deed had been executed by the seller reciting the bill filed and that the purchase was a fair one, and confirming the purchase, and that afterwards there was a settlement of accounts with the intervention of a common friend, whom the seller thanked for his kindness. As the original purchase was deemed fraudulent, and the seller was considered to have never been fully apprised of his rights, but was continued in a state of delusion by the purchaser, who imposed upon him in every transaction, the stopping the suit in chancery and the release thereupon given were considered a double hatching the fraud, and the purchase, notwithstanding the acts of confirmation, was set aside even after the seller's death (a).

37. The reporter says in a note, that the judges said there was no instance where the original contract was fraudulent, that any subsequent act could purge it. But this carries the rule too far, although a contract not affected by fraud may be held to be confirmed by an act which might not be deemed a confirmation of a really fraudulent transaction (b).

38. And even where a third person (who was tenant for life of the estate) bought a remainder subject to a contingency at its full value, of a purchaser who had obtained it fraudulently at a gross *under value, to the knowledge of the last purchaser, the original seller was relieved, although he improvidently joined in the second sale, as it was held that the second purchaser ought to have seen that the interests of the original seller were protected (c).

39. To give validity to a confirmation of a voidable conveyance, the party confirming must not be ignorant of his right, nor of course

(z) *Per* Lord Erskine, 12 Ves. jun. 373, 374.

(a) *Baugh v. Price*, 1 Wils. 320.

(b) See *De Montmorency v. Devereux*, 7 Cl. & Fin. 225.

(c) See and consider *Addis v. Campbell*, 4 Beav. 401.

must his right be concealed from him by the person to whom the confirmation is made (*d*). He must know the transaction to be impeachable that he is about to confirm, and with this knowledge and under no influence he must spontaneously execute the deed (*e*).

40. The act of confirmation must of course, therefore, take place after he has become fully aware of the fraud that has been practised; but it is not necessary that the party should be aware of all the circumstances of the transaction, but he must be aware that the act he is doing is to have the effect of confirming an impeachable transaction, otherwise the act amounts to nothing as a confirmation (*f*) (1).

41. Nor can a man be held by any act of his to have confirmed a title, unless he was fully aware at the time, not only of the fact upon which the defect of title depends, but of the consequences in point of law (*g*).

42. No act of confirmation will be valid if not given freely, but under the influence of the former transaction (*h*), and therefore a deed of confirmation called for under the pressure and influence of the former transaction, when the confirming party cannot be represented as a free agent, will not avail (*i*) (2).

43. Time might of itself bar the remedy (*k*), even where the old statutes of limitation afforded no bar (3).

44. If a purchaser of a mine in which there is a fault which has been concealed, is let into possession, and must immediately have known of the circumstances connected with the fault, it would be

(*d*) *Cann v. Cann*, 1 P. Wms. 723.

Myl. 425.

(*e*) *Dunbar v. Tredennick*, 2 Ball & Beat. 317. [*Gregg v. Harlee*, C. W. Dud. Eq. 42.] Perhaps relief ought not to have been given in *Roche v. O'Brien*, 1 Ball & Beat. 330.

(*h*) *Crowe v. Ballard*, 3 Bro. C. C. 117. [Perkins's ed. notes.] See *Scott v. Davis*, 4 Myl. & Cra. 91.

(*f*) *Per* Lord Redesdale, in *Murray v. Palmer*, 2 Scho. & Lef. 486.

(*i*) *Wood v. Downes*, 18 Ves. jun. 120.

(*g*) *Cockerell v. Cholmeley*, 1 Russ. &

(*k*) See *Medlicot v. O'Donel*, 1 Ball & Beat. 156; *Merse v. Royal*, 12 Ves. jun. 374.

(1) Where a sale of timber lands was made in 1835, and a bill was brought in 1841 to set it aside, for mistake and fraud, and it appeared that false statements had been made by the seller, going to the essence of the bargain, on which the buyer had relied, and that the existence of the fraud had not before come to the knowledge of the plaintiff, the lapse of time was held, under the circumstances, not to be a bar to the suit. *Doggett v. Emerson*, 3 Story C. C. 700.

(2) 1 Story Eq. Jur. §345.

(3) Length of time, short of the statute of limitations, is sometimes a bar; but not if fraud exists, or if the delay is accounted for, or if such a course would work injustice. *Warner v. Daniels*, 1 Woodb. & Minot, 90. See *Ferson v. Sanger*, Davies's Rep. 252.

too late, at the expiration of six months, on that ground, to file a bill for the purpose of setting aside the contract (*l*) (*1*).

*45. And now suits in equity are expressly confined to the period allowed for actions at law (*2*) (*m*), although in the case of a concealed fraud, the right to relief is deemed to first accrue at the time when the fraud shall or, with reasonable diligence, might have been known or discovered (*3*) ; but such relief is not given against a *bona fide* purchaser for valuable consideration without notice (*n*).

46. But though this is the limit, yet the act does not interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by the act (*o*). The time may be shortened, it cannot be lengthened.

47. In a case where a conveyance was set aside upon inadequacy of consideration and fraud, and the purchase-money had been secured at interest, which had been paid thereon, the Court, beyond the repayment of the principal, went further, and considered the payments of interest as made, not as interest (for the transaction was avoided), but as principal, making the seller, who was relieved from the sale, chargeable with interest on all the sums received by her, whether received as interest or as principal. Avoiding the transaction, she was not entitled to any thing as interest (*p*).

(*l*) *Small v. Attwood*, You. 503; 6
Cla. & Fin. 232, 357; and see *Lovell v.*
Hicks, 2 You. & Coll. 146.

(*n*) Sect. 26.

(*o*) Sect. 27.

(*p*) *Murray v. Palmer*, 2 Scho. & Lef.

(*m*) 3 & 4 Will. 4, c. 27, s. 24; see 488.
post, ch. 11, s. 5.

(1) Where a bill in equity was brought to set aside a sale of certain timber lands seven years after the purchase thereof, during which time the agent of the purchasers had made two explorations of the land, and had caused a large quantity of timber to be cut therefrom; — it was held that the purchasers had full knowledge, or the means of knowledge, of the condition of the lands, through their agent, which they were bound to exercise, before cutting down timber, and locating the property as their own; and that the bill was not maintainable after so great a lapse of time, particularly as it set forth no new discoveries in relation to the quantity and value of the timber, which might not have been obtained within a single year, and as the evidence was obscured as to material points. *Hough v. Richardson*, 3 Story C. C. 660. See *Veazie v. Williams*, 3 Story C. C. 611; *Saunders v. Stetson*, 2 Story C. C. 481; *Person v. Sanger*, 1 Woodb. & Minot, 138; *Pratt v. Carroll*, 8 Cranch, 471.

(2) The rule of courts of equity, aside from any statute expressly applied to them, has generally been, in proper cases, to act either in obedience to, or upon the analogy of, the general statute of limitations of actions at law. 2 Story Eq. Jur. §1521, §1521 a; 1 Daniell Ch. Pr. (Perkins's ed.) 622, 623, and 2 ib. 729 to 732, in notes where the cases are cited; Story Eq. Pl. §751 et seq.; *Person v. Sanger*, Davies's Rep. 252.

(3) Equity has always interfered to prevent the bar of the statute of limitations in such cases, aside from any statute upon the subject. 2 Story Eq. Jur. §1521; *Deloraine v. Browne*, 3 Brown C. C. (Perkins's ed.) 646 in note (a) and cases cited.

48. And the interest has been ordered to be paid at five per cent (*q*).

49. But a purchaser, where the contract is rescinded, is not to be charged with what, without wilful default, he might have made : it is not like the case of mortgagees, who are thus charged in order to make them sufficiently alert in receiving the rents (*r*).

50. In a case where a sale of leasehold houses was set aside, and the purchaser had been in possession, an occupation rent was set upon the houses, the purchaser being allowed for lasting repairs and substantial improvements, and he was to be repaid the purchase-money with interest, and there was to be a set off ; and ultimately, annual rests were directed, so as to apply the excess of the rent above the interest in reduction of the principal. The purchaser had got possession of the seller's estate, the seller ought to have had it ; on the other hand, the purchaser ought to have had the money ; this was to be set right, and in that view the excess of the rent ought to be set off annually against the principal. The rent, if applied to reduce the principal, would gradually sink the whole of *it. Now the rent belonged to the seller, and ought to have been paid to him ; the purchaser kept it, and had the benefit. Was he to go on receiving the same amount of interest whilst he had this fund in his hands (*s*) ?

51. But the purchaser in such a case is not to pay interest upon interest after the annual rent has liquidated the whole of the principal : after that it becomes merely an account of the occupation rent, which is to be taken without interest (*t*).

52. And although the purchaser is allowed the sums expended for lasting repairs and substantial improvements, with interest, yet the decree in this respect will not go beyond the prayer of the bill (*u*).

53. A purchaser, after he knows of the defect of the title, cannot, it was said by great authority, claim an allowance for subsequent repairs (*x*) (1). But this would hardly be extended to such repairs as, during the litigation or preparatory to it, were necessary to the upholding of the premises in common condition.

(*q*) *Donovan v. Fricker*, Jac. 165 ;
Turner v. Harvey, Jac. 169 ; *Edwards*
v. M'Leay, 2 Swanst. 287.

(*r*) *Murray v. Palmer*, 2 Scho. & Lef.
489.

(*s*) *Donovan v. Fricker*, Jac. 165.

(*t*) S. C.

(*u*) *Edwards v. M'Leay*, 2 Swanst. 287.

(*x*) S. C.

(1) See *Barlow v. Bell*, 1 A. K. Marsh. 246 ; *M'Kim v. Moody*, 1 Randolph, 58.

54. If a purchaser of a house, the contract for which is rescinded, have converted a private house into a shop, he may be compelled at his own expense to reinstate it as a private house (*y*).

55. It next comes in order to consider questions regarding interest and other allowances and costs where a suit is instituted; and the effect of a reversal of the decree below upon those questions.

56. If pending a suit by a purchaser to rescind a contract, interest on the purchase-money, which by the contract he was to pay at stated periods, is ordered to be paid into court instead of being paid to the seller, the seller, if the bill is dismissed, will be entitled to the stock in which the money may have been invested, and the accumulations of it, so that he will benefit by any rise in the funds, and have interest upon interest (*z*) (1).

57. But in regard to the converse of this case, viz. the investment and the accumulations falling short of the amount of the instalments due to the seller, the Court, without giving any definite opinion upon that subject, thought it quite consistent with the opinion as to the reverse of the case, that the seller should be allowed in that case to pursue any remedy he had at law to recover *the balance, and upon this plain principle, that the purchaser having prevented the seller from receiving the money at law, and having brought the money into court, could not bind him to take less than the amount whenever they paid it, which, by being brought into court, they had admitted he was entitled to (*a*).

58. A plaintiff in equity, who is under no order or condition imposed upon him by the Court to do anything for the benefit of the defendant in equity, cannot, if his bill be dismissed, be compelled by a subsequent order to give relief or satisfaction to the defendant for some matter not in the jurisdiction of the Court (*b*).

59. But if, in a suit by a purchaser to rescind a contract, an order be made for an injunction, and postponing the payment of

(*y*) S. C.

(*z*) *Small v. Attwood*, 3 You. & Coll. 105.

(*a*) *Small v. Attwood*, *ubi sup.*

(*b*) *Brown v. Newall*, 3 Myl. & Cra. 558; 3 You. & Coll. 124.

(1) Where a sale or conveyance is set aside on the ground of fraud in the vendor, interest is to be allowed on the money refunded, without reference to any demand, and from the time it was received, and whether such money was received as principal, or as interest on instalments not paid as they became due by the original contract. This, in the latter case, would of course give interest on interest. *Doggett v. Emerson*, 1 Woodb. & Minot, 195. See the decree in *Daniel v. Mitchell*, 1 Story C. C. 172, 197.

interest stipulated for by the contract till the hearing of the cause, and the bill ultimately be dismissed, the Court will then order the plaintiff to pay the instalments of interest to the purchaser instead of leaving him to recover them at law (c). But the Court could not order the payment of any instalment which had not become due at the time of the decree.

60. But although the Court by its order has postponed the payment of interest beyond the time stipulated by the contract, and ultimately dismisses the bill, and orders the plaintiff (the purchaser) to pay the instalments due, yet interest cannot be given for the delay, for the Court has allowed the party to retain the money, and therefore cannot at the hearing order interest upon it (d). The Court therefore ought not to make such an order, except upon terms which may ultimately enable justice to be done to the defendant.

61. If in such a suit, where the purchaser has a decree to rescind the contract, he obtains a transfer of a fund paid into court by himself, as instalments payable under the contract to the seller, but which the Court has intercepted and secured, and the decree be afterwards reversed, the seller is of course entitled to a retransfer of the fund if it remain unsold, and if the dividends have been received in the meantime by the purchaser, he is entitled to have the dividends also paid to him; but if the purchaser have in the meantime sold the fund, as he was entitled to do, the Court cannot compel him to pay interest upon it (e). The grounds of the distinction are not very obvious.

62. If a bill by a purchaser to rescind a contract be dismissed *with costs, which are paid, and upon an appeal the decree is reversed and the bill dismissed with costs, the Court cannot give interest upon them. The costs were paid under an order which entitled the purchaser to them, and therefore, although upon the reversal of the order he is bound to repay them, yet he is not responsible for the interest (f). This rule is of general application, and the law would be the same if the case were reversed, and the plaintiff was the seller and the defendant the purchaser.

63. If a decree in a suit by a seller or purchaser be reversed in the House of Lords, and the cause be remitted to the Court below to do what is just, the Court has no jurisdiction to do what could

(c) *Small v. Attwood*, 3 You. & Coll.
105.

(d) *Small v. Attwood*, *ubi sup.*

(e) *Ibid.*

(f) *Small v. Attwood*, *ubi sup.*

not have been done at the time of the decree ; therefore, if instalments of money were then due, which the Court, if it had dismissed the bill (as it should have done), could not have ordered payment of to the defendant, the subsequent decree of reversal will not enable the Court below to order the payment of such instalments, although they may then have actually become payable (*g*).

64. In *Small v. Attwood* (*h*) the purchase was rescinded by decree ; 200,000*l.* had been paid long before the bill was filed, and possession had been given to the purchasers of the estate, with which they had acted as owners. They had long had possession, which they still retained, and claimed a lien upon the estate for the portion of the purchase-money paid. After the decree they filed a supplemental bill, stating the payment of the 200,000*l.*, and tracing its investment in stock and the transfer of the stock to a third person without consideration, as it was alleged, and praying that they might, without prejudice to their lien on the estate, be decreed to be entitled to the specific stock, and Lord Lyndhurst, C. B., so decided, and accordingly granted an injunction.

65. This is the only case in which equity followed the purchase-money and ordered it to be specifically restored. There was an appeal against the order to the House of Lords, which it became unnecessary to prosecute, as the decree in the original suit was reversed, on the ground that no fraud was practised by the seller (*i*). But the decree could hardly have been maintained. It was a considerable argument against the relief, that it had never been administered, and the inconvenience is obvious. In the case of a mere naked fraud, which altogether vitiates a contract both at law and in equity, there is not much difficulty in attaching the money if it can be traced, as it never of right belonged to the seller. But in a case *like *Small and Attwood*, the relief although granted, and upon the ground of a fraudulent concealment, proceeds rather upon equitable rules than upon absolute legal nullity. Much arrangement is required to do justice between the parties in such a case, and the following of the money does not seem to be justified by the practice of the court, nor can it perhaps be supported upon principle. In the case in question, the purchaser had possession of the seller's estate, and had had that possession for a long time, and dealt with it as owner, and continued to retain it, and insisted upon his right to do so, and to enjoy it as owner, subject ultimately to account, until the accounts were finally settled. By the injunction he

(*g*) *Ibid.*

(*h*) *You.* 407.

(*i*) 6 *Cla. & Fin.* 232.

obtained the security of the return of his money, as well as retained his lien on the estate for it, and possession of the estate itself. It had never before occurred to any one that such relief could be obtained. If the case had remained undisturbed, it would have introduced a practice of attempting in all such cases to follow the money, and for that purpose of introducing charges and interrogatories into bills which would tend to great prolixity, and expose every dealing and transaction of a defendant, between the receipt of the money and the time of answering.

*CHAPTER V.

OF THE TIME ALLOWED TO COMPLETE THE CONTRACT.

SECTION I.

OF THE MATERIALITY OF TIME.

- | | |
|--|--|
| 1. <i>Lunar or calendar months.</i> | 8. <i>Waived at law.</i> |
| 2. <i>Time essence of contract at law.</i> | 10. <i>Waived or enlarged by writing or</i>
<i>parol.</i> |
| 4. <i>Lang v. Gale.</i> | 11. <i>Where not material in equity.</i> |
| 5. <i>Observations upon it.</i> | |
| 7. <i>Where no time fixed.</i> | |

1. In sales by private agreement it is usual to fix a time for completing the contract. In such a contract the word *month* may be construed either lunar or calendar, according to the intention of the parties, to be collected from the whole instrument taken together (a) (1).

2. The time fixed is, at law, deemed of the essence of the contract (b) (2), for it is the duty of the seller to be ready to verify the abstract on the day on which it was agreed that the purchase should be completed; and if he have not the title-deeds in his possession, or the abstract set forth a defective title, the purchaser may resist the completion of the contract, and recover his deposit (3).

3. But it is no objection that *at the time of the agreement* (c)

(a) *Lang v. Gale*, 1 Mau. & Selw. 111; see *Hipwell v. Knight*, 1 You. & Col. 419, which is, perhaps, not express enough to justify the marginal abstract.

(b) *Berry v. Young*, 2 Esp. Ca. 640 n.

(c) The marginal abstract is wrong in substituting for the time of the agreement the time agreed upon for the assignment and giving possession.

(1) See *Hardin v. Major*, 4 Bibb, 104; *Shapley v. Garey*, 6 Serg. & R. 539; *Hart v. Middleton*, 2 Carr. & Kirw. 9.

(2) *Hill v. School District No. 2*, in *Milburn*, 17 Maine, 316, 322; *Norris v. School District in Windsor*, 12 Maine, 293; *Allen v. Cooper*, 22 Maine, 133; *Wisswall v. McGown*, 2 Barbour Sup. Ct. Rep. 270.

(3) *Stitzell v. Kopp*, 9 Watts & Serg. 29.

matters remained to be done to complete the title, which in their nature were capable of being effected before the completion of the purchase (*d*).

4. In a late case (*e*), upon a sale by auction, the conditions stipulated that the abstract should be delivered to the purchaser *within a fortnight*, and should be returned at the end of *two *months*; that a draft of the conveyance should be delivered to the purchaser *within three months*, and be returned to the seller *within four months*; and that the remainder of the purchase-money should be paid on the *24th day of June* then next (which was five months after the sale), when the purchaser should receive his conveyance duly executed by all parties; to be prepared by the seller's attorney, at the expense of the purchaser. It was contended that the stipulation in regard to the delivery of the conveyance was not a condition precedent, and it was compared to the case of *Hall v. Cazenove* (*f*), where a charter-party contained a covenant by the owner, that the ship should sail on a specified day, and the owner afterwards brought an action of covenant for the freight; it was held that he need not aver that the ship sailed on that day, although the defendant (the freighter) covenanted to pay the freight in consideration of every thing above mentioned. It was not necessary to decide the point; but *Le Blanc, J.* said, that it was clear that it was a condition precedent that a draft of the conveyance should be delivered to the purchaser; the question was, whether it must be done by a particular day. It was not necessary, however, to enter upon that question; if it were, it might perhaps be material to advert to the rule, that where a condition does not go to the whole consideration (*g*) of the contract, but to a part only, it is not a condition precedent (1). *Bayley, J.* was of the same opinion. It was not a condition precedent that the draft should be delivered by a particular day, for he did not consider the precise time of the delivery as an essential ingredient in that condition, which was meant only to secure a delivery within a reasonable time.

5. The general opinion has always been, that the day fixed was

(*d*) *Stowell v. Robinson*, 3 Bing. N. C. 928. (*f*) 4 East, 477.
 (*e*) *Lang v. Gale*, 1. Mau. & Selw. 111. 564. (*g*) See *Havelock v. Geddes*, 10 East,

(1) *Bennet v. Pixley*, 7 John. 250; *Roberts v. Marston*, 20 Maine, 275, 277; *Boone v. Eyre*, 1 H. Black. 273, n; 1 Saund. 320 n. (*c*); *Tompkins v. Elliot*, 5 Wendell, 496; *Payne v. Bettisworth*, 2 Marsh. 429; *Obermyer v. Nichols*, 6 Binney, 166.

imperative on the parties at law (*h*) (1). This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties. In the above case, for example, the different times appointed, 1. for delivery of the abstract; 2. for the return of it; 3. for the delivery of the conveyance; 4. for the return of it; and 5. for the completion of the purchase, were all links of the same chain, and if one link were broken, the whole chain would be destroyed. If the time appointed for the delivery of the conveyance was not an essential ingredient, but was meant only to secure a delivery within a reasonable time, it follows that the same rule must apply to the time fixed for the return of it, and also to the time appointed for *the completion of the purchase. The effect of this rule would be, that the appointment of a day would have no effect, and in every case it must be referred to a jury to consider whether the act was done within a reasonable time. The precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. This cannot be compared to a case like *Hall v. Cazenove*: there the ship did sail without being countermanded, and the substance of the covenant was considered to be, that the ship should go to the place named on freight and return again, and if the freighter sustained any damage by reason of the ship not having sailed on the particular day, he might recover it by bringing an action on the covenant. In favor of justice the covenants were not considered as dependent on each other. It would be monstrous that the ship should be permitted to sail to the place named, and return again, and yet not earn any freight, because it did not sail on the day appointed. So where covenants go only to a part of the consideration, and a breach may be paid for in damages, the defendant has a remedy on the covenant, and shall not plead it as a condition precedent. If *A* covenant with *B* to build a house for him according to a certain plan, and *B* covenant with *A* to pay for the house so built, it is clear, notwithstanding some authorities to the contrary, that if *A* build a house, although, not strictly according to the plan, yet *B* must pay for it, and may

(*h*) See 9 Adol. & Ell. 517.

(1) *Shaw v. Wilkins*, 8 Humph. 647; *Shuffleton v. Jenkins*, 1 Morris, 427; *Tyler v. Young*, 2 Scammon, 444; *Chitty Contr.* (8th Am. ed.) 276, 626; *Tyree v. Williams*, 3 Bibb, 366. Where the purchase money is to be paid or secured, and the conveyance executed on a particular day, and neither party performs or offers to perform on the day, neither can sustain an action at law on the contract. *Stevenson v. Maxwell*, 2 Comstock, 408.

recover in a distinct action against the builder for any damage sustained by the departure from the plan (1). The justice of this is evident. But in the case under consideration, the agreements go to the whole consideration on both sides; they are mutual conditions; the one precedent to the other (*i*). If the draft of the conveyance, for instance, is not delivered on the day appointed, the party who ought to deliver it has broken his agreement, and therefore cannot recover upon it at law. This works no injustice; for the further execution of the contract is at once stopped; the seller retains his estate, and the purchaser his purchase-money, and the party making default is liable, as he ought to be, to an action for breach of his engagement. It is to be hoped, therefore, that the day appointed will always be deemed of the essence of the contract at law. It has so been held in a recent case in the Common Pleas (*k*). And in a later case upon a sale of goods, where fourteen days were allowed from the day of sale to the purchaser to clear away the goods, the seller was not prepared to deliver them *the day after the sale to the purchaser, who applied for them; and it was held, that he (the seller) had broken his agreement, and could not recover against the purchaser, who refused to perform the contract (*l*). Where the purchaser by a covenant in the contract, was to pay a further sum of money, provided the adjoining houses should be completed, that is, paved in front, &c. before a day named, and the pavement was not completed until after the day appointed, although the delay was occasioned by the bad weather, which prevented the workmen from proceeding, yet the seller was held not entitled to recover the money (*m*).

6. In a case at law (*n*) where the agreement was to let a house for a year from the 25th March, the tenant to take the fixtures at a valuation in the usual way, and to pay for the same on entry, it was held that if by the terms of the agreement the party was to enter on the 25th of March, and was to pay an ascertained amount on that day, he would, unless he paid on that day, have no ground of action for not being let into possession: yet here the clause in the

(*i*) *Boone v. Eyre*, 1 H. Blackst. 273. See 10 East, 564; *Lloyd v. Lloyd*, 2 Myl. & Cra. 192; *Franklin v. Miller*, 4 Adol. & Ell. 599.

(*k*) *Wilde v. Forte*, 4 Taunt. 334.

(*l*) *Hagedon v. Laing*, 1 Marsh. 514; and see *Cornish v. Rowley*, *post*; *Stow-*

ell v. Robinson, 3 Bing. N. C. 928; see *Martindale v. Smith*, 1 Adol. & Ell. N. S. 389.

(*m*) *Maryon v. Carter*, 4 Carr. & Pay. 295.

(*n*) *Edman v. Allen*, 6 Bing. N. C. 19.

agreement was that he must take the fixtures at a valuation, and pay on entry, that is, when he enters he must pay: a tender therefore and demand of possession after the 25th March was valid, for the tenant had a continuing right of entry, and there was a continued refusal to admit him on the part of the lessor.

7. Where a precise time is not fixed for making out a title, it will not be implied from slight circumstances; and in such a case the seller must be allowed a reasonable time (1). Therefore where by the conditions of sale, the abstract was to be delivered within fourteen days, objections to the title were to be communicated to the vendor within twenty-one days after the delivery of the abstract, a conveyance was to be prepared on or before the 10th of November, and the purchaser was to sign an agreement to pay the purchase-money on or before the 28th, it was held that as there was no express, so there was no implied time for making out the title; for the condition to pay on the 28th bound the purchaser, not the vendor, and the purchaser's signing such an agreement did not imply an agreement by the vendor that he will at all events complete the title by that day (o).

8. But a party may even at law waive the forfeiture, and enlarge the time of his contract (p).

*9. And where a purchaser of a coffee-house, after a valuation which was not completed until 10 o'clock at night of the last day, at a quarter before 12 o'clock, tendered the purchase-money and demanded possession to be given of the whole of the premises, including certain cottages which were let to weekly tenants, and as that could not be complied with, brought his action to recover the deposit and damages, the Lord Chief Justice stated to the jury that, as it appeared the purchaser was aware of the cottages being occupied by weekly tenants, his postponing the demand of possession till the last moment might be looked upon as a waiver, and that it appeared to be a device on the part of the purchaser to obtain a rescission of the contract, and the verdict was for the seller (q).

10. Where the contract is under seal, a subsequent agreement not under seal, made before breach of the agreement, enlarging the

(o) *Sansom v. Rhodes*, 6 Bing. N. C. Smith, 1 Crompt. & Mees. 585; and see 261; 8 Scott, 544; *sed qu.* *Stowell v. Robinson*, 3 Bing. N. C. 928.

(p) *Carpenter v. Blandford*, 8 Barn. & (q) *Temple v. Palmer*, 1 Per. & Dav. Cress. 575; and *qu.* see *Sweetland v.* 381, cited.

(1) *Chitty Contr.* (8th Am. ed.) 277, 625 and notes; *Watts v. Sheppard*, 2 Alabama, 425; *Sawyer v. Hammatt*, 15 Maine, 40; *Cocker v. Franklin H. & F. Man. Co.* 3 Sumner, 530.

time for performance of the contract, is invalid at law (*r*). And even where the agreement is not under seal, a subsequent parol agreement to alter or enlarge the time is void (*s*) (1).

11. But *equity*, which from its peculiar jurisdiction is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will in certain cases carry the agreement into execution, notwithstanding that the time appointed be elapsed (2); and although there has been no waiver; for, as Lord Eldon remarks, the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, *not merely as to the time*, but an alteration of circumstances affecting the value of the thing; or objections arising out of circumstances *not merely as to the time*, but the conduct of the parties during the time; unless the objection can be so sustained, many of the cases go the length of establishing, that the objections cannot be maintained (*t*) (3). Perhaps there is cause to regret that even *equity* assumed this power of dispensing with the literal performance of contracts in cases like these.

12. Objections on account of delay seem divisible into two kinds. The one where the delay is attributable to the neglect of either party; the other where the delay is unavoidably occasioned by the state of the title; and of each of these we shall treat in its order.

(*r*) *Rippingall v. Lloyd*, 2 Nev. & Mann. 410.

(*s*) *Stowell v. Robinson*, 3 Bing. N. C. 928; see *Lawrence v. Knowles*, 7 Scott, 381.

(*t*) *Per* Lord Eldon, see 7 Ves. jun. 274; and see *Hearne v. Tenant*, 13 Ves. jun. 287. See *Lennon v. Napper*, 2 Scho. & Lef. 683.

(1) See ante, 168 and notes; *Wiswall v. McGown*, 1 Hoff. Ch. Rep. 126; *Avery v. Kellogg*, 11 Conn. 575.

(2) See *Chitty Contr.* (8th Am. ed.) 276, note; post 302, §28 and note; *Waters v. Travis*, 9 John. 450; *Voorhees v. De Meyer*, 2 Barbour Sup. Ct. 37; *Leggett v. Edwards*, Hopkins, 530; *Gibbs v. Champion*, 3 Ham. (Ohio,) 335.

(3) So if, on the other hand, from the lapse of time, the circumstances have been so changed that a specific performance, such as would answer the ends of justice, has become impossible, the objection is decisive. *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Law*, 9 Cranch, 456, 494; *Brashier v. Gratz*, 6 Wheaton, 528.

*SECTION II.

OF DELAYS OCCASIONED BY THE NEGLECT OF EITHER PARTY.

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| 1. <i>Time in equity : Gibson v. Paterson.</i> | 10. <i>Where vendor loses his remedy.</i> |
| 3. <i>Purchaser must be prompt.</i> | 12. <i>There must be gross negligence.</i> |
| 5. <i>Diligence necessary in equity.</i> | 14. <i>Time required for repairs, or to get possession.</i> |
| 6. <i>Agreement void at law if title not ready.</i> | 15. <i>Effect of delay by purchaser.</i> |
| 8. <i>But in equity both parties must be active.</i> | 16. <i>Unwilling purchaser.</i> |
| 9. <i>Waiver by receipt of abstract after the day.</i> | 17. <i>Reversion sold : time important.</i> |
| | 18. <i>Or if sale is to pay debts, &c.</i> |
| | 19. <i>Or by ecclesiastical corporation.</i> |
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1. THE time fixed on for the completion of a contract, had formerly less attention paid to it in equity than is now given to it, which seems to have arisen from the case of *Gibson v. Paterson* (*a*), where, according to the report, a specific performance was decreed in favor of the plaintiff, the vendor, without any regard had to his negligence in not producing his title-deeds, &c. within the time limited. And Lord Hardwicke is reported to have said, that most of the cases which were brought into the Court, relating to the execution of articles for the sale of an estate, were of the same kind, and liable to that objection ; but that he thought there was nothing in the objection.

2. It appears, however, that this case is mis-reported ; for Lord Rosslyn, in *Lloyd v. Collett* (*b*), said he had looked into the case of *Gibson v. Paterson*, in which the reporter had made Lord Hardwicke treat the time as totally immaterial. He said, it was to be observed, that the circumstances of that case, of which he had taken a copy, did not call for any such opinion. The purchaser, who hung back, had bought an estate in mortgage. The contract took place in November, and was to be completed in February ; in that time, therefore, the mortgage could only be paid off by treaty with the mortgagee. Upon the facts it appeared, that application had been made to the mortgagee, who consented to take his money.

(*a*) 1 Atk. 12.

Ves. jun. 326 ; *Alley v. Deschamps*, 13

(*b*) 4 Ves. jun. 690, n. ; 4 Bro. C. C. 497. See *Radcliffe v. Warrington*, 12

Ves. jun. 225.

Drafts of conveyance were made, and countermanded by the purchaser. He had, after the contract, demised part of the estate to the vendor at a rent; and, upon application being made to him, every thing being ready, he said he would be off the bargain; he had no money to pay for it; and if they attempted to force him, he would go to Scotland to avoid it. Lord Rosslyn added, there could not be the smallest argument upon it, nor the least doubt about the decree.

3. But whatever opinion Lord Hardwicke entertained on this subject (*c*), it is now settled, that a man cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager; and therefore time alone is a sufficient bar to the aid of Court (1).

4. Thus in a case (*d*) where the parties differed as to the construction of an agreement, and after a delay of seven years one of the parties filed a bill for a specific performance, it was dismissed merely on account of the staleness of the demand.

5. A bill for a specific performance is an application to the discretion, or rather to the extraordinary jurisdiction of equity, which cannot be exercised in favor of persons who have long slept upon their rights, and acquiesced in a title and possession adverse to their claim. Due diligence is necessary to call the Court into activity, and where it does not exist, a court of equity will not lend its assistance; it always discountenances laches and neglect (*e*).

6. If the vendor be not ready with his abstract and title-deeds at the day fixed, the purchaser may avoid the agreement at law (2).

(*c*) See 1 Ves. 450.

13 Ves. jun. 225.

(*d*) *Milward v. Earl of Thanet*, 5 Ves. jun. 720, n. (*b*). See *Alley v. Deschamps*, 68.

(*e*) *Per Lord Manners*, 1 Ball & Beat.

(1) Laches and negligence in the performance of contracts are not to be countenanced or encouraged; and the party seeking specific performance must show, that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready, desirous and prompt to perform. But where the party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the acts or conduct of the other party, that amounts to an acquiescence in that delay, the court will not compel a specific performance. *Rogers v. Saunders*, 16 Maine, 92; *Benedict v. Lynch*, 1 John. Ch. 375; *Garnett v. Macon*, 6 Call, 308; *Goodwin v. Lyon*, 4 Porter Eq. 297; *Hays v. Hall*, 4 Porter Eq. 374; *Scott v. Fields*, 8 Ohio, 92; *Wiswall v. McGown*, 2 Barbour Sup. Court Rep. 270; *Voorhees v. De Meyer*, ib. 37; *Wells v. Smith*, 7 Paige, 22; S. C. 2 Edwards, 68; *More v. Smedburgh*, 8 Paige, 600; *Reed v. Chambers*, 6 Gill & John. 490. See *Cristin v. Heermance*, 1 Clarke, 133; *Falls v. Carpenter*, 1 Dev. & Bat. 277; *Page v. Hughes*, 2 B. Monroe, 441; post, 302, note; *Pratt v. Carroll*, 8 Cranch, 471; *Pratt v. Law*, 9 Cranch, 456, 494; *Somerville v. Trueman*, 4 Harr. & M'Hen. 43.

(2) Ante, 284 and cases in note; *Chitty Contr.* (8th Am. ed.) 276.

7. Thus, in a case (*f*) where upon a sale it was agreed that a good title should be made out by the 10th of July: in the beginning of July the purchaser called on the vendor to show him the title-deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title-deeds at the particular day.

8. This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as for the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery (*g*), or do not ask for it until it has become impossible *to execute the agreement by the day fixed (*h*), equity will consider the time as waived.

9. So, if the purchaser receive the abstract after the day appointed, and do not at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance *in specie* (*i*) (1).

10. It is, however, clearly settled, that a specific performance will not be enforced, where no steps have been taken by the vendor, although in proper time urged by the purchaser to do so, and the purchaser, immediately when the time is elapsed, insists upon his deposit, and refuses to perform the agreement (2).

11. This was decided in *Lloyd v. Collett* (*k*); the case was, that on the 10th August 1792, the defendant contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of the title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it before the 10th of June 1793, when he brought an action for the deposit. On the 16th September 1793 an abstract was delivered; the purchaser

(*f*) *Berry v. Young*, 2 Esp. Ca. 640, n.; vide *supra*, p. 283.

(*g*) *Guest v. Homfrey*, 5 Ves. jun. 818.

(*h*) *Jones v. Price*, 3 Anstr. 924.

(*i*) *Smith v. Burnam*, 2 Anstr. 527; and see *Seton v. Slade*, 7 Ves. jun. 265.

(*k*) 4 Bro. C. C. 469; 4 Ves. jun. 689. See 5 Ves. 737; 7 Ves. jun. 278; and see *Pincke v. Curteis*, stated *infra*; *Potts v. Webb*, 4 Bro. C. C. 330, cited; *Paine v. Meller*, 6 Ves. jun. 349; and *Warde v. Jeffery*, 4 Price, 294.

(1) See *Avery v. Kellogg*, 11 Conn. 575.

(2) Ante, 289, note, post, 302, note.

was then out of town, and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November the bill was filed by the vendor for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it. And he therefore considered the contract as at an end.

12. But where a vendor has proceeded to make out his title, and has not been guilty of gross negligence, equity will assist him, although the title was not deduced at the time appointed.

13. Thus, in *Fordyce v. Ford* (1), the purchase was to be completed on the 30th July 1793. The abstract was not delivered until the 8th, and the treaty continued until the 25th of September, on which day the deeds were delivered, and every difficulty cleared *up; when the purchaser refused to proceed, alleging that he wanted the estate for a residence for the last summer, and insisting he was not bound to go on, on account of the delay. The Master of the Rolls said, the rule certainly was, that where in a contract either party had been guilty of gross negligence, the Court would not lend its assistance to the completion of the contract; but in this case he thought there had been no such negligence, and decreed accordingly; adding, that he hoped it would not be gathered from thence, that a man was to enter into a contract, and think he was to have his own time to make out his title.

14. If an estate was described as in good repair, and it turn out to be in bad repair, and several months may be required to repair it, yet the purchaser cannot resist the contract on the ground of time, unless it could be clearly shown, that he wanted possession of the house to live in at a given period, by which time the repairs could not be completed (m). So if the estate is in lease, and it was stated that the purchaser would be entitled to possession several months before the lease actually expire, yet he cannot rescind the agreement, unless the personal occupation of the estate

(1) 4 Bro. C. C. 494; [Perkins's ed. notes.] *Radcliffe v. Warrington*, 13 Ves. jun. 323. (m) See *Dyer v. Hargrave*, 10 Ves. jun. 505, *infra*, ch. 7.

was essential to him at the time appointed (*n*). In this last case, however, the jurisdiction should be sparingly exercised.

15. The rules on this subject apply, as they ought to do, to each party. And therefore, where a purchaser permits a long time to elapse, without evincing a fixed marked intention to carry his contract into execution, he will be left to his remedy at law, although he may have paid part of the purchase-money. He is not to be suffered to lie by, and speculate on the estate rising in value (*o*) (1). Nor will he be assisted by equity, where he has made frivolous objections to the title, and trifled, or shown a backwardness to perform his part of the agreement, especially if circumstances are altered (*p*) (2). And where the price is unreasonable or inadequate, or the contract is in other respects inequitable, equity will not assist either party, if he has permitted the day appointed for completing the contract to elapse without performing his part of the agreement (*q*).

*16. It was observed by Hart, L. C., that if the principle of discharge by delay applies in the case of a willing purchaser, it is open to the other side to rebut that, by showing that the purchaser was not a willing purchaser, and that he ought not to be discharged on the ground of hardship of delay. He who relies on the allegation that he was always ready and willing, must be prepared to meet the allegation that he was tardy and reluctant (*r*).

17. The time, however, is more particularly attended to in sales of reversion; for it is of the essence of justice that such contracts should be executed immediately, and without delay. No man sells a reversion who is not distressed for money; and it is ridiculous to talk of making him a compensation by giving him interest on the purchase-money during the delay (*s*).

18. So time is very material where the estate is sold in order to pay off any incumbrance bearing a higher rate of interest than the vendor is entitled to receive, in respect of the purchase-money,

(*n*) *Hall v. Smith*, Rolls, 18 Dec. 1807, MS.; S. C. 14 Ves. jun. 426; and see 13 Ves. jun. 77.

(*o*) *Harrington v. Wheeler*, 4 Ves. jun. 686; *Alley v. Deschamps*, 13 Ves. jun. 225.

(*p*) *Hayes v. Caryll*, 1 Bro. P. C. 27; 5 Vin. Abr. 538, pl. 18; *Spurrier v. Hancock*, 4 Ves. jun. 667; *Pope v. Simpson*, 5 Ves. jun. 145; and *Coward v. Odingsale*, 2 Eq. Ca. Abr. 688, pl. 5;

and see *Green v. Wood*, 2 Vern. 632; *Bell v. Howard*, 9 Mod. 302; and *Main v. Melbourn*, 4 Ves. jun. 720.

(*q*) Vide *post*, ch. 6; and *Whorwood v. Simpson*, 2 Vern. 186; *Lewis v. Lord Lechmere*, 10 Mod. 503.

(*r*) 2 Molloy, 584.

(*s*) *Newman v. Rodgers*, 4 Bro. C. C. 391; and see *Spurrier v. Hancock*, 4 Ves. jun. 667; 1 Price, 298, and 1 You. & Col. 416.

(1) *Rogers v. Saunders*, 16 Maine, 92; *post*, 302, note.

(2) *Post*, 302, note.

during the delay (*t*); or the estate is sold for the purposes of a trade or manufactory (*u*); or the subject of the contract is in its nature of a fluctuating value (*x*) (1).

19. Again, if a party is dealing with an ecclesiastical corporation, time must of necessity be in a very great degree of the essence of the contract, especially where the purchaser is not dealing for the purchase of a fee-simple estate in possession (in which case the interest of the purchase-money is considered as an equivalent for the rents and profits), but for a concurrent lease; in which case the lapse of every day changes the value and nature of the thing to be granted, and changes also the persons who are to participate in the sums to be paid (*y*).

(*t*) Popham *v.* Eyre, Lofft, 786; and see a case cited in 2 Scho. & Lef. 604.

Jeffreys, 1 Hare, 348.

(*u*) Parker *v.* Frith, 1 Sim. & Stu. 199; Wright *v.* Howard, *ib.* 190; Coslake *v.* Tilt, 1 Russ. 376; Walker *v.*

(*x*) Doloret *v.* Rothschild, 1 Sim. & Stu. 590.

(*y*) Carter *v.* Dean and Chap. of Ely, 7 Sim. 211; *per V. C.*

(1) See Hepburn *v.* Auld, 5 Cranch, 279, *Per* Livingston J.; Rogers *v.* Saunders, 16 Maine, 92, 101.

*SECTION III.

OF DELAYS OCCASIONED BY THE STATE OF THE TITLE.

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| 1. Delay through title not material. | 22. Title too late after purchaser has abandoned. |
| 2. Vendor should file a bill. | 23. Delay in filing a bill. |
| 3. Procuring title after filing bill. | 24. Waiver of time by vendor. |
| 4. At law, where no time fixed. | 25. Vendor may rescind contract where money cannot be paid. |
| 5. Willet <i>v.</i> Clarke. | 27. Forfeiture of deposit. |
| 6. Title at time of trial not sufficient. | 28. Time in equity may be of essence of contract. |
| 9. In equity, time allowed. | 30. Greyson <i>v.</i> Riddle. |
| 10. Purchaser not bound where new suit necessary. | 34. Observations on the rule. |
| 12. Or an account of debts to be taken. | 35. } When not of essence, time may |
| 14. Title should be at date of report. | 37. } be fixed by notice. |
| 15. Purchaser proceeding with knowledge of defect. | 36. Reynolds <i>v.</i> Nelson. |
| 17. Acceptance of abstract with notice. | 40. Rule in equity where no time limited. |
| 20. Proceeding, but with protest. | |
| 21. Dormant treaty. | |

1. It may be laid down as a general proposition, that a delay accounted for on the above ground will not prevent a specific per-

formance from being decreed, where the time fixed for completing the contract is not material (1).

2. Where time is not material, and the title is bad, but the defect can be cured, if the vendee is unwilling to stay, the vendor should file a bill in equity to enforce the performance of the contract (a); for it is sufficient if the party entering into articles to sell has a good title at the time of the decree; the direction of the Court being, in all these cases, to inquire whether the seller *can*, not whether he *could*, make a title at the time of executing the agreement (2).

3. This principle was followed in a case of frequent reference (b). And in a late case (c), the vendor, at the time he filed the bill for a specific performance, had only a term of years in the estate, of which he had articked to sell the fee-simple, and after the bill was *filed, procured the fee by means of an act of parliament; and as

(a) See 6 Ves. jun. 655; 10 Ves. jun. 646; Seton v. Slade, 7 Ves. jun. 265. 315. (c) Wynn v. Morgan, 7 Ves. jun. 202.

(b) Langford v. Pitt, 2 P. Wms. 629; See Eyston v. Simonds, 1 You. & Col. and see Jenkins v. Hiles, 6 Ves. jun. C. C. 608.

(1) In equity, time may be dispensed with, if it be not of the essence of the contract. Hepburn v. Auld, 5 Cranch, 262; Brashier v. Gratz, 6 Wheaton, 207; Getchell v. Jewett, 4 Greenl. 350; Benedict v. Lynch, 1 John. Ch. 370; Garnett v. Macon, 6 Call, 308; Wells v. Smith, 2 Edwards, 78; Runnels v. Jackson, 1 How. (Miss.) 358; Wells v. Wells, 3 Iredell Ch. 596; Fletcher v. Wilson, 1 Smedes & Marsh. Ch. 376.

(2) A court of equity will not decree the specific performance of a contract, and compel the purchaser to accept a title, which the vendor cannot make out to be clearly good and free from incumbrance. Butler v. O'Hear, 1 Desaus. 382; Lewis v. Herndon, 3 Litt. 358; Kelley v. Bradford, 3 Bibb, 317; Seymour v. Delancey, 1 Hopkins, 436; Young v. Lillard, 1 Marsh. 482; Morgan v. Morgan, 2 Wheaton, 290, 299; 1 Fonbl. Eq. B. 1, ch. 3, § 9, note (i). But equity will not aid a purchaser, who had a full knowledge of the defect in the title; Craddock, 3 Marsh. 288; or if his conduct has amounted to a waiver of the objection. Roach v. Rutherford, 4 Desaus. 126. See Ramsay v. Brailsford, 2 Desaus. 590, 591.

It is sufficient, if the vendor be able to make a good title before decree pronounced, although he had not a good title when the contract was made; Hepburn v. Auld, 5 Cranch, 262, 275; Finley v. Lynch, 3 Bibb, 566; Tyree v. Williams, 3 Bibb, 366; Seymour v. Delancey, 3 Cowen, 445; Pierce v. Nichols, 1 Paige, 244; Cotton v. Ward, 3 Monroe, 304, 313; Baldwin v. Salter, 8 Paige, 473; Dutch Church, &c. v. Mott, 7 Paige, 78; 2 Story Eq. Jur. §377; Clute v. Robison, 2 John. 595; unless the purchaser has sustained an actual and serious injury by the inability of the vendor to give him a good title to the premises at the time required by the contract. Nodine v. Greenfield, 7 Paige, 545; Dutch Church v. Mott, 7 Paige, 78.

If there be any doubt or difficulty about the title, it is usually referred to a Master to be examined and reported on. Pierce v. Nichols, 1 Paige, 246; M'Comb v. Wright, 4 John. Ch. 659, 670. See also further on the subject of enforcing specific performance in cases of defective and doubtful titles. Tomlin v. M'Chord, 5 J. J. Marsh. 136; Beale v. Seiveley, 8 Leigh, 658; Bryan v. Reed, 1 Dev. & Bat. Eq. 86; Watts v. Waddle, 1 M'Lean, 200; Cooper v. Denne, 4 Brown C. C. (Perkins's ed.) 87, 88 and notes.

the day on which the contract was to be carried into execution was not material, a specific performance was decreed.

4. The same rule prevails at law, *where no time is fixed for completing the contract*, and an application for the title has not been made by the purchaser previously to an action by the vendor for breach of contract. For in *Thompson v. Miles (d)*, a man agreed to sell a term of which he stated forty years to be unexpired. It appeared there were only thirty-nine, but by an agreement indorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled, that the vendor having at that time a good title was sufficient. He said, that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, by a private act of parliament gets such an estate as will enable him to make a title, that is sufficient: that here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up against the plaintiff a want of title, though the power of making that title was obtained after the action was brought (1).

5. In *Willet v. Clarke (e)*, an agreement for sale of an estate referred to the conditions of sale for the time of completing it, and difficulties arising, a second agreement was executed, by which possession, which had already been taken, was further assured to the purchaser, and he agreed to pay the residue of the purchase-money on the 25th of December next, upon the seller making a good title, or otherwise, if such title should not be then completed, upon the seller executing a bond to complete such title as soon as the same could be completed. A title was not made and a bond was not executed on the 25th of December, but one was executed, and it was tendered nearly two years after that date; and it was held at law, that no objection could be sustained on that ground, for there was nothing in the agreement requiring the bond to be executed within a given time; on the contrary, it was an alternative depending upon a very uncertain matter, the completing the title in the meantime. The time in this case was really not of the essence of the contract; it was not a contract of such a nature as to make the time essential.

(d) 1 Esp. Ca. 184; see *Willet v. Clarke*, 10 Price, 207. (e) 10 Price, 207.

(1) See *Blann v. Smith*, 4 Blackf. 517; *Tarwater v. Davis*, 2 English, 153; *Woodcock v. Bennett*, 1 Cowen, 725.

6. But if the vendor cannot verify his abstract at the time appointed, or if he produce a defective title, and the purchaser bring *an action for recovery of the deposit, the vendor having a title at the time of the trial will not avail him. Thus, in *Cornish v. Rowley* (*f*), where a purchaser sought to recover his deposit, it appeared that the abstract of the title began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry, it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said they were ready to make out a good title. Lord Kenyon said, that the vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, he was aware, was often given for the purpose of procuring probates of wills, &c. But this indulgence was voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed (1). If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favor of infants, femmes covert, &c. As a good title was not made out at the day fixed, he should direct the jury to find a verdict for the deposit, with interest up to that day. And a verdict was found by the jury accordingly.

7. So in *Bartlett v. Tuchin* (*g*), assignees of a bankrupt sold an estate, and no time was fixed for completing the purchase. The purchaser upon a supposed defect of title abandoned the contract; afterwards the commission was superseded, and a new one issued, under which the same assignees were chosen. It was held that the purchaser might rescind the contract, for at the time he gave notice of his abandonment of the contract, the assignees could not make out a good title. And in a late case (*h*), the facts were, that upon a sale it was agreed that the purchase-money should be paid on or before Lady-day 1803, on having a good title. The vendors were assignees of a bankrupt who claimed under a will. They thought

(*f*) B. R. Midd. Sitt. after M. T. 40 Geo. III.; 1 Selw. N. P. 160; Dobell v. Hutchinson, 3 Adol. & Ell. 335.

(*g*) 1 Marsh. 583. See Goodwin v. Lightbody, Dan. 153; Roper v. Coombes,

6 Barn. & Ald. 584.

(*h*) Seward v. Willock, 5 East, 198; 1 Smith's Rep. 390, S. C.; and see Radcliffe v. Warrington, 12 Ves. jun. 326, where the purchaser recovered at law.

(1) Chitty Contr. (8th Am. ed.) 276; Tarwater v. Davis, 2 English, 153; Blann v. Smith, 4 Blackf. 517.

that he had an estate-tail under the will, and that therefore they could make a title ; but under the devise he only took for life, with contingent remainders over. The bankrupt, however, being heir at law of the testator, could make a title by levying a fine, and was willing to join ; but these facts were not stated in the abstract delivered, or communicated to the purchaser until a fortnight before the *assizes. The Court, after showing that the bankrupt took only an estate for life under the devise to him, said, as it was stated, that previous to the time fixed for payment of the money, and completion of the purchase, or indeed till near the time of trial, no information was given to the purchaser that the bankrupt was heir at law of the testator, but the title of the assignees appeared to have been delivered in, on the supposition of the bankrupt being tenant in tail, they thought that the defendant had failed in making good the agreement on his part ; and that thereupon a right of action at law had accrued to the plaintiff. How far the title since communicated might in another course of proceeding in another place, render the present proceeding abortive ; and whether the plaintiff might not be ultimately compelled to fulfil his agreement, was not for them in that action to decide.

8. But a seller need not at law, any more than in equity, have those things done in regard to title, which may properly be effected before the completion of the purchase ; therefore, at the time of the contract, the want of a license to assign, where one is requisite, or the neglect to register a deed which requires registry, is unimportant (i).

9. In an early case (k) the Court of Chancery carried the doctrine very far ; for at the time of the articles for sale, or even when the decree was pronounced, Lord Stourton, the vendor, could not make a title, the reversion in fee being in the Crown ; and yet the Court indulged him with time more than once for the getting in the title from the Crown, which could not be effected without an act of parliament, to be obtained in the following session : however, it was at length procured and Sir Thomas Meers decreed to be the purchaser (I) ; and even at this day, although the Master report against

(i) *Robinson v. Stowell*, 3 Bing. N. C. 928 ; 5 Scott, 196. see *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526 ; *Ormerod v. Hardman*, 5 Ves.

(k) *Lord Stourton v. Sir Thomas Meers*, stated in 2 P. Wms. 631 ; and jun. 722.

(I) Note, it appears that Sir Thomas Meers was mortgagee of the estate ; (see *Sir Thomas Meers v. Lord Stourton*, 1 P. Wms. 46,) and it is therefore probable that at the time he entered into the contract he was aware of the defects in the title.

the title, yet if it appear that the seller will have a title, upon getting in a term, or procuring letters of administration, &c. the Court will not release the purchaser; but will put the vendor under terms to complete his title speedily (*l*). Or if a new fact appear which enables him to make a title when the cause is before the Court on further directions, the contract will be enforced (*m*).

*10. But the Court will not extend the rule which it has adopted of compelling a purchaser to take the estate where a title is not made till after the contract, to any case to which it has not already been applied. Therefore in a case whereupon a creditor's bill filed for sale of the real estate of a trader, the usual accounts were decreed and a sale ordered, and the estates were accordingly sold; but it afterwards appeared that the fact of the trading was not regularly proved, and then the cause was re-heard, the decree upon which re-hearing was also open to objection; the purchaser under the decree was upon motion relieved from his purchase, although the parties were willing to take steps to remove the objections (*n*).

11. Where a testator devised his real estate to trustees to pay debts, with a direction first to sell estate *A*, and if that were deficient, to sell estate *B*, and the trustees agreed to sell the latter estate, and upon a bill filed against the purchaser, the Master reported a good title, Lord Eldon held, that it was necessary to have a report of debts, in order to show that estate *A* was insufficient. The sellers then proposed to get a report immediately; but the purchaser refusing to submit to any delay, Lord Eldon dismissed the bill. The vendees, however, refused to give up the contract, and they filed a bill to compel the vendors to execute it, praying the accounts, which, although objected to as vexatious, Lord Eldon held to be right, and they got a decree (*o*). But it may be observed that there was no proper suit in which to take the accounts, and the purchasers had a right to become plaintiffs, in order to obtain a title by their own diligence. If a purchaser were to obtain the dismissal of a bill against him, not on the ground that he would himself file a proper bill, but that he would not wait any longer, the Court would not relieve him if he were afterwards to file a bill.

(*l*) Coffin *v.* Cooper, 14 Ves. jun. 205.

(*m*) Esdaile *v.* Stephenson, 8 Aug. 1822, MS.; 6 Mad. 367; Sidebotham *v.* Barrington, 4 Beav. 110; 5 Beav. 261; *infra*, ch. 8.

(*n*) Lechmere *v.* Brasier, 2 Jac. &

Walk. 287; Dalby *v.* Pullen, 3 Sim. 29; 1 Russ. & Myl. 296; Coster *v.* Turnor, 1 Russ. & Myl. 311; Magennis *v.* Falen, 2 Moll. 566, 580; Chamberlain *v.* Lee, 10 Sim. 444.

(*o*) *Per* Hart, L. C., 2 Molloy, 566.

12. So in a case in Ireland, it was held, that a purchaser cannot be kept without his title until an account of debts is taken. The Court cannot suspend a purchaser until a new decree is made and report had (*p*).

13. But although a seller has, upon the expressed opinion of the Court, filed a bill to take an account, yet if the purchaser seek to avoid the contract on that ground, the seller may argue the necessity of the measure. Conforming to the opinion of the Court does *not bind the party complying not to controvert the necessity of such proceedings as the Court directed to be taken (*q*).

14. The general rule is, that if there is not a good title at the date of the report, the purchaser is entitled to be discharged, because a purchaser is not to be kept for future inquiries; a title is not to be made out by instalments, and not what the title is now, but what it was when the Master ruled the objections is the state of the title to be pronounced upon (*r*). But if the title is that originally produced, although the evidence to support it has varied, the purchaser is bound; for the evidence and not the title is altered, and evidence which may satisfy one man's mind may be unsatisfactory to another's (*s*).

15. Where a purchaser enter into, or proceeds in a treaty, after he is acquainted with defects in the title, and knows that the vendor's ability to make a good title depends on the defects being cured, he will be held to his bargain, although the time appointed for completing the contract is expired, and *considerable further time* may be required to make a good title (*1*).

16. Thus in a case (*t*), where it was agreed upon a purchase, that it should be completed on the 5th April 1792, it appeared that the purchaser had applied for an abstract at the latter end of January, or the beginning of February, which not being sent to him, he, after the expiration of the time for the completion of the purchase, applied for his deposit, saying, that he should not proceed in his purchase. About the 21st of April an abstract was sent him, and it appeared that a suit in Chancery must be deter-

(*p*) *Magennis v. Fallon*, 2 Mol. 561.

(*q*) S. C.

(*r*) *Kirwan v. Blake*, 2 Moll. 581, 582, cited; see *Cowgill v. Lord Oxmantoun*, 3 You. & Coll. 377.

(*s*) 2 Moll. 582.

(*t*) *Pincke v. Curteis*, 4 Bro. C. C.

329; and see *Smith v. Burnam*, 2 Anstr. 527; and *Paine v. Meller*, 6 Ves. jun. 349; *Warde v. Jeffery*, 4 Price, 295; see *Smith v. Sir Thomas Dolman*, 6 Bro. P. C. 291, by Tomlins. *Ex parte Gardner*, 4 You. & Coll. 503.

(1) Ante, 293, in note. See *Jackson v. Ligon*, 3 Leigh, 161; *Barnett v. Gaines* 8 Alabama, 373.

mined before a title could be made, upon which he again declared he would not proceed in the purchase, and again required his deposit. In Trinity term he brought an action for his deposit, and, on the 6th of November, the bill was filed. The purchaser, by his answer, stated that the suit was still depending, and that questions of law had arisen, which then stood for argument in the Court of King's Bench.

The Lords Commissioners Ashhurst and Wilson granted an injunction, which was continued by Lord Rosslyn, who said, in these contracts (sales by auction) in general, the time of completing the contract is specified, and a deposit is paid; and if the title is *not made out by the time, the vendee is entitled to take back his deposit. But in this case *the vendee was apprised of the title depending on the ability of the vendors to make a good title, which itself depended on the event of a Chancery suit, and was, notwithstanding, willing to go on with his purchase; there had been a communication of the delay of the suit, and the present bill was filed after great delay* (I). If the vendee had called for his deposit at the end of the time limited for completing the purchase, and insisted he would not go on with his purchase, the Court would not have compelled him. The cause was afterwards heard before the Master of the Rolls, who was also of opinion, that there had been a sufficient communication of the real state of the delay, and that the purchaser had acquiesced in it, or at least not sufficiently declared his dissent to go on with the purchase; and therefore it was referred to the Master to inquire as to the title.

17. So in *Seton v. Slade* (u), it appeared that the purchaser was aware of the objections to the title at the time he purchased the estate, and afterwards accepted the abstract within a few days of the time appointed for completing the contract. He had, however, previously declared, that if the title was not made out by the time, he would relinquish the contract; and the day after the time appointed he actually applied for his deposit, alleging that the abstract, so far from showing a right in the vendor to convey, stated merely a contract for the purchase by him, without noticing a suit in Chancery. But the purchaser having been aware of the

(u) 7 Ves. jun. 265. See *Wood v. Bernal*, 19 Ves. 220; *Hipwell v. Knight*, 1 You. & Col. 401.

(I) The judgment shows the true ground of the decree; but according to the state of facts in the report, the case was similar to that of *Lloyd v. Collett*, stated *supra*, p. 290.

objections to the title, and having afterwards received the abstract, a specific performance was decreed.

18. And even where the Court thought that time was of the essence of the contract, yet the purchaser was held to have waived it by receiving an abstract of an assignment upon which the title depended, and which would not be valid under the bankrupt law until a period subsequently to the time appointed for completing the contract, and by corresponding upon that abstract. The Court said that he ought to have refused to accept the abstract or to have sent it back forthwith (*x*) (1).

19. Again (*y*), where personal representatives of a trustee, supposing erroneously they had power to sell, entered into a contract *for sale, and when the mistake was discovered, the purchaser was apprised that the sellers would take the necessary steps to make a title, which they did, but before they were completed, the purchaser brought an action for his deposit, which he recovered, and then the sellers filed a bill for a specific performance; it was held that the purchaser, if he had thought fit, might have declined the contract as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but not having taken that course, it was enough that at the hearing a good title could be made.

20. In a case before Hart, L. C., in Ireland, he observed that it was true, where a man having contracted goes on contesting the title without a protest against the delay, then the waiver is clear. But if he says, "I protest against the delay, but I am not sure my protest is valid, and I shall go on to make the best case I can to be discharged," that would go only to the costs, and not amount to acquiescence (*z*). This view, however, does not seem to be warranted by the authorities.

21. Although a treaty may have lain dormant for some time, yet if the contract is not abandoned, a performance will be decreed *in specie*. Thus in a case (*a*) where, upon objections to a title, the treaty had proceeded for about two years, when the vendor's solicitor wrote, calling for a distinct answer, saying, that otherwise

(*x*) *Hipwell v. Knight*, 1 You. & Col. 401.

(*y*) *Hoggart v. Scott*, 1 Russ. & Myl. 293.

(*z*) *Magennis v. Fallon*, 2 Moll. 576; 441. see p. 297, *supra*.

(*a*) *Marquis of Hertford v. Boore*, 5 Ves. jun. 719. See *Milward v. Earl of Thanet*, 5 Ves. jun. 720, n. (*b*); *Garrett v. Lord Besborough*, 2 Dru. & Walsh,

(1) See *Avery v. Kellogg*, 11 Conn. 562.

he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which, he stated, he had suffered material inconvenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

22. But if a purchaser object to the title, and declare he will not complete the contract, and the vendor acquiesce in this declaration, he cannot afterwards clear up the objections to his title, and compel the purchaser to perform the agreement. This was decided in the case of *Guest v. Homfray (b)*. The purchaser took objections to the title, and was informed that no better title could be made; whereupon he said, he would not proceed in the purchase, and *afterwards returned the abstract, at the desire of the vendor, at the same time acquainting him that he (the purchaser) still considered the contract was at an end. In about eight months after this the abstract was returned, with the objections answered, and the bill was filed upon the defendant refusing to complete the contract. But the bill was dismissed, although it was clear that the purchaser had almost all the time wished to be off the bargain. Lord Alvanley, Master of the Rolls, said, they should have cautioned the purchaser, and told him they were going on to make out a title. If they had done all that, and shown a probable ground to the purchaser that they might make a good title, he said, he should perhaps not have thought a year too long.

23. In *Watson v. Reid (c)*, the contract was in June 1826. An abstract was delivered, and a correspondence took place with respect to the title. On the 7th April 1827 the purchaser gave notice that he objected to the title, and abandoned the contract; and on the 1st May he demanded a return of the deposit. The seller refused to return it; and on the 25th April 1828 filed a bill for a specific performance, and the Master of the Rolls dismissed it with costs, upon the ground of unreasonable delay in filing it.

24. Although a time is expressly appointed, within which objec-

(b) 5 Ves. jun. 818.

(c) 1 Russ. & Myl. 236.

tions are to be made to the title, it may be enlarged by the conduct of the seller, amounting to a waiver (*d*).

25. Where circumstances are such that the purchase-money cannot be paid for a length of time, as if the purchaser die, or become bankrupt before the contract be carried into effect, and his executors, or assignees, are not able to get in the assets or effects, the vendor is entitled to require the contract to be rescinded, and he will be allowed his costs (*e*); or he may demand a specific performance; and if the defendants are unable or unwilling to perform the contract, that the estates may be resold; and if the purchase-money arising by the resale, together with the deposit, shall not amount to the purchase-money, that the defendant may pay the deficiency.—A bill for the latter purposes was filed by a vendor against the assignees of a bankrupt, and a decree was made for resale. The deficiency upon that resale was 5,016*l.*; and the cause coming on for further directions, Lord Rosslyn directed that sum to be proved under the commission; saying, the whole purchase-money *was the debt, and the vendor had a lien on the estate (*f*); which proving by the resale deficient, the residue was to be proved under the commission (*g*).

26. In *Wright v. Wellesley* (*h*), upon a sale it was agreed that part of the purchase-money should be secured by mortgage. There was a decree for a specific performance, and a conveyance and mortgage were directed to be executed and further directions were reserved. The Master made his report, by which it appeared that the purchaser had made default in bringing in the proper deeds, and he found what was due, which was regularly demanded, but not paid. The plaintiff, the seller, presented a petition, which came on with the further directions, praying the sale of the property, in consequence of the purchaser's default. It was objected that this could not be done; and that at all events a supplemental bill was necessary; but the Vice-Chancellor made the order as prayed for: as the defendant had evaded the decree of the Court, he would give the relief required by the new state of circumstances, and he thought that the petition was regularly presented.

27. In a late case, where an estate was sold by auction, in order

(*d*) *Cutts v. Thodey*, 13 Sim. 206; Bro. C. C. 396; *Dickenson v. Heron*, *supra*, ch. 4, s. 5. *infra*, ch. 16, s. 1.

(*e*) *Mackreth v. Marlar*, 1 Cox, 259; (*f*) *Vide supra*, ch. 1.

Cox's n. (1) to P. Wms. 67; *Whittaker v. Whittaker*, 4 Bro. C. C. 31. See n. See *Rome v. Young*, 3 You. & Coll. 199.

(*h*) V. C. 26 Feb. 1833. MS.

to pay off incumbrances, under the usual conditions, and the purchase was to be completed on the 25th of March 1805, the estate was sold for 123,000*l.* and the purchaser paid only 4,000*l.* as a deposit when he ought to have paid 24,000*l.* A short time previously to Lady-day he wrote a letter to the vendors, acknowledging his inability to pay, and requesting them to join in a resale, offering to pay any loss by the second sale. This they refused; and he not having the money ready, on the 27th of March 1805, filed a bill for a specific performance, evidently to gain time. The vendors filed a cross-bill; and afterwards the purchaser became a bankrupt, when the causes were revived. The expenses of the vendors, in payment of the auction-duty, &c. were very considerable. The cross cause came on first; the assignees of course could not bind themselves to pay the money; and the contract was decreed to be delivered up and cancelled, so that the vendors became entitled to the 4,000*l.* deposit (i).

28. We are now to consider whether equity will permit the parties to make time the essence of the contract (1).

In *Williams v. Thompson*, or *Bonham (j)*, the bill was to carry *into execution the trusts of a will, and for a specific performance of an agreement by Bonham to purchase a real estate of the defend-

(i) *Steadman v. Lord Galloway, et c* Contr. 238, stated. See the case in Reg. *contra*, Rolls, 9th Feb. 1803. Lib. B. 1781, fol. 561.

(j) 4 Bro. C. C. 331, cited; Newl.

(1) Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. 2 Story Eq. Jur. §776; *Voorhees v. De Meyer*, 2 Barbour Sup. Ct. Rep. 37. Fonbl. Eq. B. 1, ch. 6, §2 and notes; B. 1, ch. 1, §5 and note (o); *Heppburn v. Dundas*, 5 Cranch, 262; *Brashier v. Gratz*, 6 Wheaton, 528; *Taylor v. Longworthy*, 14 Peters, 173, 174; S. C. 1 M'Lean, 395; *Baldwin v. Salter*, 8 Paige, 473. It is true, that courts of equity have regard to time, so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance; or if he comes, *reventi facto*, to ask for a specific performance; the suit is treated with indulgence, and generally with favor by the court. But then, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances affecting the character or the justice of the contract; 2 Story Eq. Jur. §776; *Pratt v. Law*, 9 Cranch, 456, 493, 494; *Brashier v. Gratz*, 6 Wheaton, 528; *Mechanics Bank v. Lynn*, 1 Peters, (S. C.) 383; *Taylor v. Longworthy*, 14 Peters, 172; *Doar v. Mathews*, 1 Bailey Eq. 371; that the chances of gain by delay have not been speculated upon by the party asking for indulgence; *Rogers v. Saunders*, 16 Maine, 92, 99, 100; *Alley v. Deschamps*, 13 Vesey, 228; that compensation for the delay can be fully and beneficially given; *Pratt v. Law*, 9 Cranch, 456, 493, 494; that he, who asks a specific performance, is in a condition to perform his part of the contract; *Morgan v. Morgan*, 2 Wheaton, 290; and that he has shown himself ready, desirous, prompt, and eager to perform the contract. 2 Story Eq. Jur. §776; *King v. Hamilton*, 4 Peters, 311. See *Newman v. Rogers*, 4 Brown C. C. (Perkins's ed.) 393, note; *Hertford v. Boore*, 5 Sumner's Vesey, 719 and note; ante, 289, and note.

ants. By the agreement, dated the 9th of July 1778, it was particularly expressed, "that in case a good title to the premises, discharged from all claims and demands whatsoever, should not be made out to the satisfaction of Bonham within three years from the date thereof, the agreement thereby made, so far as concerned the purchase of the premises (for the agreement contained other stipulations), should from thenceforth become void." The defendant was always ready to have completed his purchase, but the trustees under the will were incapable of making out a title without the aid of equity, and for that purpose the bill in question was filed in February 1781. The cause came to a hearing on the 29th of June 1782, when the defendant (Bonham) insisted, that the title not having been made out at the time mentioned in the agreement, he was discharged from his purchase. But Lord Thurlow was of opinion, that the time fixed by the articles for making a title to the defendant was only formal, and not of the essence of the agreement; and, as appears by the Registrar's book, he declared, that the three years being expired was not a sufficient objection to the agreement being performed.

29. This case depends so much on its own complicated circumstances, as scarcely to admit of being cited as an authority ruling any other case. I find, from the Registrar's book, that it was impossible to make a title without a decree. The agreement, which was very long and special, stated all the facts; and it was expressly stipulated, that the trustees should use their utmost endeavors to obtain a decree, and the purchaser was immediately let into possession. Now the bill was filed before the expiration of the three years, no laches was imputed to the trustees, and it did not appear that the purchaser had sustained any loss, or been put to any inconvenience. It would therefore have been a strong measure to hold, that the time was of the essence of the contract. The purchaser entered into the contract with full knowledge of all the obstacles in the way of making a title; and unless the purchase was completed, there was no mode of indemnifying the trustees for the expense incurred by the Chancery suit.

30. In the case of *Gregson v. Riddle* (*k*), which was also before Lord Thurlow, the agreement was for a particular day; with a proviso, that in case the title should not be approved in two months, the agreement was to be void and of no effect. There

*was an outstanding legal estate, which could not be got in by that

(*k*) 7 Ves. jun. 268, cited.

time. A bill was filed for a specific performance. The defendant resisting, a reference was directed, to see whether a good title could be made; Lord Loughborough, then Lord Commissioner, expressing an opinion that the terms of the agreement were complied with (1). The report was in favor of the title. The cause coming on before Lord Thurlow, the performance was still resisted. Lord Thurlow said, it had been often attempted to get rid of agreements upon this ground, but never with success. The utmost extent was to hold it evidence of a waiver of the agreement; but it never was held to make it void. Mr. Mansfield, for the defendant, said the intention was clearly to make it void; and that it would be necessary to insert a clause, that notwithstanding the decision of the Court of Chancery, it should be void. Lord Thurlow said, such a clause might be inserted; *and the parties would be just as forward as they were then.*

31. On this *dictum* it must be remarked, that the case did not call for it, as the agreement appears to have been *substantially* performed within the time. And it is said, that in *Potts v. Webb*, before Lord Thurlow, it being part of the terms that the purchase should be completed by a certain time, his Lordship thought that a good reason for not decreeing a specific performance (1). At the same time it must be admitted, that Lord Thurlow entertained a floating opinion, that time could not in general be made of the essence of the contract. It does not appear, however, that any case ever came before him in which he was called upon to decide the point, and his opinion has not been followed in subsequent cases.

32. For in *Lloyd v. Collett* (m), in which the case of *Gregson v. Riddle* was cited, Lord Rosslyn said, the conduct of the parties, inevitable accident, &c. might induce the Court to relieve; but it was a different thing to say the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to rescind it (1).

(1) 4 Bro. C. C. 330, cited.

(m) 4 Bro. C. C. 469; 4 Ves. jun. 689 note; stated *supra*, p. 290.

(1) The stipulation was, that in case the title should not be approved of by the purchaser's counsel within two months, the articles should be void. The difficulty upon the title arose upon a settlement which the seller insisted was voluntary, and not upon a mere outstanding legal estate. The seller insisted upon being at liberty to rescind the contract, under the clause in the articles.

(1) See ante, 289, note and cases.

*33. And in the case of *Seton v. Slade* (*n*), Lord Eldon said, he inclined much to think, notwithstanding what was said in *Gregson v. Riddle*, that time may be made the essence of the contract.

34. The case under consideration has been assimilated to a mortgage, where, although the parties may have expressly stipulated, that if the money be not paid at a particular time, the mortgagor shall be foreclosed, yet equity will permit him to redeem, in the same manner as if no such stipulation had been entered into. There does not appear to be any analogy between the cases. In a mortgage such a declaration is inserted by the mortgagee for his own advantage; but as the land is merely a security for the debt, equity rightly considers that a mortgagee ought only to require his principal and interest, and not to obtain the estate itself, by taking advantage of the necessities of the mortgagor. Once a mortgage and always a mortgage, has therefore become a maxim; and under this axiom equity is indeed administered; the parties being put in possession of their respective rights without detriment to each other. The same reasoning seems to apply to relief against a penalty. But in an agreement for sale of an estate, where it is expressly declared that the contract shall be void if a title cannot be made by a stated time, the parties themselves have *mutually* fixed upon a time; the *bona fides* of such a transaction seems to be a bar to the interference of a court of equity; and if the contract be vacated by virtue of the agreement, the parties will still be in the possession of their respective rights. We may therefore, perhaps, venture to assert, that if it *clearly appear to be the intention of the parties* to an agreement, that time shall be deemed of the essence of the contract, it must be so considered in equity (*o*) (1). In the late case of

(*n*) 7 Ves. jun. 265; and see *Lewis v. Lord Lechmere*, 10 Mod. 503. See also 3 Ves. jun. 693; 12 Ves. jun. 333; 13 Ves. jun. 289; 2 Mer. 140; *Levy v.*

Lindo, 3 Mer. 81; *Warde v. Jeffery*, 4 Price, 294.

(*o*) See Appendix, No. 6.

(1) *Hays v. Hall*, 4 Porter Eq. 297; *Scott v. Fields*, 8 Ohio, 92; *Runnels v. Jackson*, 1 Howard (Miss.) 358; *Longworth v. Taylor*, 1 M'Lean, 395; *S. C.* 14 Peters, 173, 174; *Crislin v. Heermance*, 1 Clarke, 133; *Falls v. Carpenter*, 1 Dev. & Batt. 277; *Rogers v. Saunders*, 16 Maine, 92; *Page v. Hughes*, 2 B. Monroe, 441; *Goodwin v. Lyon*, 4 Porter Eq. 297; *Doar v. Mathews*, 1 Bailey Eq. 371; ante, 289 in note; 2 Story Eq. Jur. §776; *Mason v. Wallace*, 3 M'Lean, 148; *Shuffleton v. Jenkins*, 1 Morris, 427; *Hunter v. Daniel*, before Wigram V. C. Lincoln's Inn, March, 1845. A new agreement entered into by the parties, extending the time, is evidence that they regard the time as material. *Wiswall v. McGown*, 2 Barbour Sup. Ct. Rep. 270.

Hudson v. Bartram (*p*), the Vice-Chancellor (Sir John Leach) said, that the principle was admitted now that time may be made of the essence of the contract. Why are not parties to insert such a stipulation in their contract? It is difficult to understand how the doubt arose, but it is now at an end; and in *Lloyd v. Rippingale*, where time was in those very words made of the essence of the contract, it was so decreed (*q*). In the later case of *Hipwell v. Knight*, Mr. Baron Alderson considered the rule to be, that the real contract and all the stipulations really intended to be complied with literally should be carried into effect. He thought, that if the parties chose, even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing to be done at a particular time, such a stipulation ought to be carried literally into effect in a court of equity. That is the real contract; the parties had a right to make it; why then should a court of equity interfere to make a new contract which the parties had not made (*r*)?

35. Where time is not made of the essence of a contract by the contract itself, although a day for performance is named, of course neither party can strictly make it so after the contract; but if either party is guilty of delay, a distinct written notice by the other, that he shall consider the contract at an end if it be not completed within a reasonable time to be named, would be treated in equity as binding on the party to whom it is given.

36. In *Reynolds v. Nelson* (*s*), where the purchaser was in possession as tenant, the point arose, but the seller's notice was, that if the purchaser made default in attending on one of the days named in the notice to complete the purchase, he should consider him as refusing to perform the agreement and act accordingly: and the Vice-Chancellor observed, that although it might now be considered as the settled doctrine of the Court, that by the terms of the agreement time might be made the essence of the contract, yet it had not been decided that where there was no stipulation in the contract, time might be made essential by subsequent notice that it will be so considered, and in this case he might leave that point untouched. The notice given was not that the seller would consider the contract at an end if it was not completed within the time, and whether he would act as if the contract were abandoned,

(*p*) 12 Dec. 1818, MS.; S. C. 3 Madd. 440; and see *Boehm v. Wood*, 1 Jac. & Walk. 419; *Williams v. Edwards*, 2 Sim. 78.

(*r*) 1 You. & Col. 410, cited. The

writer thinks he was counsel in the cause.

(*q*) 1 You. & Col. 416.

(*s*) 6₄ Madd. 18.

or would act by filing a bill for a specific performance, he left wholly in doubt; and it was to be observed, that he neither returned nor tendered the deposit which he had received. The usual reference as to the title was therefore made.

37. It may be observed, that the time allowed in this case by the notice was too short, being only three days; but where there has been delay, and the seller gives a proper notice to put an end to the contract in order to quicken the purchaser or to be released from the contract, it must not from the concluding observation in the judgment be inferred, that it is in all cases necessary to return *or tender the deposit, for the purchaser by his neglect may have lost his right to have it returned, and the seller's notice, if disregarded, may not revive the purchaser's right to recover. The general operation of such a notice is now settled (*t*).

38. A condition stipulating that the time appointed after the deliveriey of an abstract, for the taking of objections, shall be of the essence of the contract, means after the delivery of a perfect abstract (*u*).

39. Where time from the nature of the contract is essential, and it is disputed that the title was made within the stipulated time, it will be referred to the Master to inquire when it was first shown a good title could be made without prejudice to any question in the cause (*x*).

40. It remains to observe, that *where no time is limited for the performance of the agreement*, the cases considered under the first division in this chapter will assist the student in forming a judgment in what instances equity will assist a party who has been guilty of laches, although every case of this nature must in a great measure depend upon its own particular circumstances. The cases classed under the second division apply, however, with greater force to cases where no time is limited than to those where a day is fixed, for in the former cases, the Court has not to struggle against an express stipulation of the parties.

41. A case came before the Lords Commissioners in 1792 (*y*), where no time was limited for performing the agreement. The plaintiff was one of two devisees in trust to sell, and pay debts, and

(*t*) Taylor v. Brown, 2 Beav. 180;
King v. Wilson, 6 Beav. 124; and see
Heaphy v. Hill, 2 Sim. & Stu. 29.

(*u*) Hobson v. Bell, 2 Beav. 17; see
Cutts v. Thodey, 13 Sim. 206.

(*x*) Foxlowe v. Amcoats, 3 Beav. 496.

(*y*) Tyrer v. Artingstall, Newl. Contr.
236. See the case in Reg. Lib. B. 1792,
fo. 28, nom. Tyrer v. Bailey.

had alone sold the estate (1), and entered into articles with the defendant. The co-trustee afterwards refused to join ; and there was a mortgagee who refused to be paid off. Neither of these circumstances was disclosed to the purchaser, and upon this delay in the title he proceeded to bring his action against the vendor for a breach of the agreement. The plaintiff brought his *bill to compel a specific performance, and have the co-trustee join ; and the mortgage redeemed, and to stay the action. The defendant suffered an injunction to go against him for want of an answer ; and having afterwards answered, a motion was made to dissolve the injunction ; and the cause shown by the plaintiff was, the possibility of making a good title by this very suit. The Court held the purchaser bound, and continued the injunction.

42. In this case it appears from the Registrar's book, that the purchaser insisted on his purchase, and that the injunction should be dissolved ; which was certainly a very important feature in the cause. It was not the case of a man merely seeking to recover his deposit. It must, however, be repeated, that it is impossible to lay down any general rule applicable to cases where no time is appointed for performing the agreement. Indeed, throughout this chapter, it has been found impossible to treat the subject of it in an elementary manner.

(1) The estate was sold by auction *with the concurrence of the other trustee*. The plaintiff, however, alone signed the agreement.

*CHAPTER VI.

OF THE CONSIDERATION.

SECTION I.

OF UNREASONABLE AND INADEQUATE CONSIDERATIONS.

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| <ol style="list-style-type: none"> 1. <i>Unreasonable price, yet specific performance.</i> 2. <i>Unless there be fraud or concealment.</i> 3. <i>Or there is gross inadequacy.</i> 5. <i>Fall in value immaterial.</i> 6. <i>Purchaser seldom relieved after conveyance.</i> 8. <i>Inadequacy of price no bar.</i> 9. <i>Sale by auction.</i> 10. <i>Life annuity.</i> 11. <i>Concealment by purchaser.</i> 14. <i>Misrepresentation by purchaser.</i> 15. <i>Both parties ignorant of value.</i> 18. <i>Seller seldom relieved after conveyance : gross inadequacy.</i> 20. <i>Unless ignorant of right, and purchaser aware of it.</i> 21. <i>Or advantage taken of distress.</i> 23. <i>Heir dealing for expectancy favored.</i> 24. <i>Although unprovided for.</i> 25. <i>Purchaser to prove adequacy.</i> 26. <i>Dealings between father and son.</i> 27. <i>Sellers of reversions not heirs.</i> 28. <i>Bulk sold reversionary.</i> 29. <i>Loan under mask of trading : King v. Hamlet.</i> 30. <i>Observations on that case.</i> 31. <i>Where sale of reversion valid.</i> 32. <i>Gowland v. De Faria : value by the tables, and market price.</i> 33, 36. <i>Observations upon that case.</i> | <ol style="list-style-type: none"> 34. <i>Dews v. Brandt.</i> 37. <i>Scott v. Dunbar.</i> 38. <i>Hinksman v. Smith.</i> 39, 41. <i>Headen v. Rosher.</i> 40. <i>Potts v. Curtis.</i> 41. <i>Newton v. Hunt.</i> 43. <i>Wardle v. Carter.</i> 44. <i>Lord Aldborough v. Trye.</i> 45. <i>Ryle v. Swindells.</i> 46. <i>Evidence of surveyors.</i> 47. <i>Sale by auction valid.</i> 48. <i>Or person in possession join.</i> 52. <i>Where contingency cannot be valued.</i> 55. <i>Mis-statement of consideration.</i> 56. <i>How adequacy to be shown.</i> 57. <i>Delay and confirmation.</i> 58. <i>Sale set aside, upon what terms.</i> 59. <i>Improvements allowed for.</i> 60. <i>Price to be fixed by arbitrators.</i> 62. <i>Cannot delegate authority.</i> 63. <i>Where Court will fix the price.</i> 64. <i>Not where parties chosen.</i> 66. <i>Failure of arbitration : death.</i> 67. <i>Nomination of arbitrator cannot be compelled.</i> 68. <i>Where award after death of party binding.</i> 69. <i>Acquiescence in informal award.</i> 70. <i>Injunction refused, where authority revoked.</i> 72. <i>Attachment. action.</i> |
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1. IT seems that a court of equity cannot refuse to assist a

vendor merely on account of the price being unreasonable (a) (1) : *and a specific performance will certainly be enforced, if the price was reasonable at the time the contract was made, how disproportionate soever it may afterwards become (2).

2. If, however, a man be induced to give an unreasonable price for an estate, by the fraud (b), or gross misrepresentation (c), of the vendor; or by an industrious concealment of a defect in the estate (d), equity will not compel him to perform the contract (3).

3. And where these circumstances do not appear, but the estate is a grossly inadequate consideration for the purchase-money, equity will not relieve either party. Thus in a case at the Rolls before Lord Alvanley, by original and cross-bill, the estate was represented on the one hand of the value of 9 or 10,000*l.*; and on the other of only 5,000*l.* The contract was for 6,000*l.*, and 14,000*l.* at the death of a person aged sixty-five. Lord Alvanley said, it was not a case of actual fraud; but it was insisted the bargain was grossly inadequate; and the inadequacy was very great: it was impossible upon the whole evidence to make the estate to be worth more than 10,000*l.*: though he ought not to decree a performance, yet as no advantage was taken of necessity, &c. he was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages; and he accordingly dismissed both bills (e).

4. Indeed few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not

(a) *City of London v. Richmond*, 2 Vern. 421; *Hanger v. Eyles*, 2 Eq. Ca. Ab. 689; *Hicks v. Phillips*, Prec. Cha. 575; 21 Vin. Abr. (E), n. to pl. 1; *Keen v. Stukeley*, Gilb. Eq. Rep. 155; 2 Bro. P. C. 396; *Charles v. Andrews*, 9 Mod. 151; *Lewis v. Lord Lechmere*, 10 Mod. 503; *Saville v. Saville*, 1 P. Wms. 745; *Adams v. Weare*, 1 Bro. C. C. 567; and the cases, as to inadequacy of price,

cited *infra*.

(b) See *James v. Morgan*, 1 Lev. 111, a case at law. *Conway v. Shrimpton*, 5 Bro. P. C. by Toml. 187.

(c) *Buxton v. Cooper*, 3 Atk. 383.

(d) *Shirley v. Stratton*, 1 Bro. C. C. 440. [Perkins's ed. notes.]

(e) *Day v. Newman*, 2 Cox, 77; 10 Ves. jun. 300, cited; and see *Squire v. Baker*, 5 Vin. Abr. 549, pl. 12.

(1) See Post, 311, in note.

(2) See *Falls v. Carpenter*, 1 Dev. & Bat. 237; *Osgood v. Franklin*, 2 John. Ch. 26. There seems to be no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be an infant. *Garnett v. Macon*, 6 Call, 308.

(3) See *Gregg v. Harlee*, C. W. Dud. Eq. 42. The inadequacy of price may be so great, as, of itself, to afford a presumption of fraud; *Butler v. Haskell*, 4 Desaus. 651; *Udall v. Kenney*, 3 Cowen, 590; *Gist v. Frazier*, 2 Litt. 118; *Harde-man v. Burge*, 10 Yerger, 202; *Fripp v. Frupp*, Rice Eq. 84.

performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie* (*f*) (1).

5. But a purchaser will be compelled to complete his contract although by the calamities of the times between the contract and the conveyance, estates generally are reduced several years' purchase in value, for that ought not to rescind the contract (*g*).

6. But there are few cases in which a purchaser could be relieved after the conveyance is executed and the purchase completed, on account of the unreasonable price (*h*) (2).

7. We have already considered whether the purchase-money can *be followed so as to compel the restitution of it, or the property in which it is invested, even where the contract is set aside for misrepresentation of value (*i*).

8. Mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance to a purchaser (*k*), (3) particularly where the estate is sold by auction (*l*).

9. In *White v. Damon*, however, although the estate was sold

- (*f*) See the cases cited in n. (*a*), *ante*; *Barrett v. Gomeserra*, Bunb. 94; *Underwood v. Hithcox*, 1 Ves. 279; *Mortlock v. Buller*, 10 Ves. jun. 292; and *Lowther v. Lowther*, 13 Ves. jun. 95; (*g*) *Poole v. Shergold*, 2 Bro. C. C. 118. [Perkins's ed. notes.] (*h*) *Small v. Attwood*, You. 407; *Pike v. Vigers*, 2 Dru. & Walsh, 1. (*i*) *S. C. You. 507*, *supra*, ch. 4, s. 5. (*k*) *Coles v. Trecothick*, 9 Ves. jun. 234; *Burrows v. Lock*, 10 Ves. jun. 470. See *Young v. Clark*, *Préc. Cha.* 538; (*l*) *White v. Damon*, 7 Ves. jun. 30. See *Collett v. Woollaston*, 3 Bro. C. C. 228.

(1) *Garnett v. Macon*, 6 Call, 308; *Rugge v. Ellis*, 1 Desaus. 161; *Turner v. Clay*, 3 Bibb, 52; *Ramsay v. Brailsford*, 2 Desaus. 582.

(2) *Post*, 314; *McKinney v. Pinkard*, 2 Leigh, 149.

(3) *Seymour v. Delancey*, 3 Cowen, 445; *White v. Flora*, 2 Tenn. 426; *January v. Martin*, 1 Bibb, 586; *Udall v. Kenney*, 3 Cowen, 590; *Bunch v. Hurst*, 3 Desaus. 292; *Gregor v. Duncan*, 2 ib. 636; *Butler v. Haskell*, 4 ib. 651; *Osgood v. Franklin*, 2 John. Ch. 1; *S. C.* 14 John. 427; *Beard v. Campbell*, 2 A. K. Marsh. 127; *ante*, 235, 236; *Sarter v. Gordon*, 2 Hill Ch. 126; *Moth v. Atwood*, 5 Sumner's Vesey, 845 and note; *Coles v. Trecothick*, 9 ib. 234; *Delafield v. Anderson*, 7 Smodes & Marsh. 630; *Cathcart v. Robinson*, 5 Peters, 264.

In *Osgood v. Franklin*, 2 John. Ch. 23, it was held, that inadequacy of price, though not so gross as to amount to fraud, may be a sufficient ground for refusing to enforce a specific performance of a contract; and a distinction is noted between setting aside a contract for inadequacy, and refusing to decree specific performance for that cause. See *Mortlock v. Buller*, 10 Sumner's Vesey, 292 and notes; *Seymour v. Delancey*, 6 John. Ch. 222. In this last case, it was held also, that though mere inadequacy of price, independent of other circumstances, is not, of itself, sufficient to set aside a transaction, yet it may be sufficient to induce the court to stay the exercise of its discretionary power to enforce a specific performance of a private contract for the sale of land, and to leave the party to seek his compensation in damages, at law; especially where the inadequacy of price is so great, (being *half* the value,) as to give to the contract the character of unreasonableness, inequality, and hardship. See *Clitherall v. Ogilvie*, 1 Desaus. 250; 2 Story Eq. Jur. §769; *Brashier v. Gratz*, 6 Wheat. 528; *Ellis v. Burdon*, 1 Alabama, 458, 459; *Garnett v. Macon*, 6 Call, 308.

by auction, Lord Rosslyn dismissed the bill merely on account of the inadequate price given for the estate, viz. 1,120*l.* and it was worth 2,000*l.*; but on a rehearing before Lord Eldon, although the decree was affirmed upon a different ground, yet he said, he was inclined to say that a sale by auction, no fraud, surprise, &c. cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the Court would not specifically perform the agreement. And in a subsequent case (*m*), he expressed the same opinion, and referred to the case of *White v. Damon* (1).

10. But if an uncertain consideration (as a life-annuity) be given for an estate, and the contract be executory, equity it seems will enter into the adequacy of the consideration (*n*) (2).

11. Although a purchaser is not bound to acquaint the vendor with any latent advantage in the estate (*o*), yet any concealment, for the purpose of obtaining an estate at a grossly inadequate price, may be deemed fraudulent (3).

12. Thus in the case of *Deane v. Rastron* (*p*), an agreement was made for sale of land at a halfpenny per square yard. The price was in all about 500*l.*, the real value 2,000*l.* The purchaser went out to an attorney, got him to calculate the amount, and desired him not to tell the vendor how little it was; then carried the agreement to the vendor, and prevailed on him to sign it immediately. The Court of Exchequer said, the desire of concealment would be such a fraud as to void the transaction, as parties to a contract are supposed, in equity, to treat for what they think a fair price.

*13. So as we have seen, the not discovering to the seller, who was ignorant of the fact, the death of a party, which increased the value of the estate, although the death was publicly known, was deemed a sufficient ground to rescind the contract (*q*).

(*m*) *Ex parte Latham*, 7 Ves. jun. 35, note.

(*o*) See 2 Bro. C. C. 420.

(*n*) *Pope v. Root*, 7 Bro. P. C. 184; *Mortimer v. Capper*, 1 Bro. C. C. 156; and *Jackson v. Lever*, 3 Bro. C. C. 605; see *Bower v. Cooper*, 2 Hare, 408; *Kennedy v. Wexham*, 6 Madd. 355.

(*p*) 1 Anst. 64; and see *Young v. Clerk*, Prec. Cha. 538; *Lukey v. O'Donnell*, 2 Sch. & Lef. 466.

(*q*) *Turner v. Harvey*, Jac. 169; *Brealey v. Collins*, You. 317; *supra*, ch. 4, s. 5, pl. 5.

(1) In *Seymour v. Delancey*, 6 John. Ch. 222, Mr. Chancellor Kent discusses the reasons and propriety of the remarks of Lord Eldon in *Damon v. White*, and he seems to doubt the correctness of Lord Eldon's suggestions, in that case, as applied to any sales excepting, perhaps, those made at auction. See *Damon v. White*, 7 Sumner's Vesey, 30 in note.

(2) See *Warner v. Daniels*, 1 Woodb. & Minot, 90.

(3) See *Bowman v. Bates*, 2 Bibb, 52.

14. So a misrepresentation by the purchaser, who was the agent of the seller, of the value of the estate, although it operated only to a small extent, has been held to be a sufficient defence against a bill for a specific performance; for to entitle a person to call for the aid of a court of equity, he must go there with clean hands (*r*).

15. Where neither of the parties knows the value of the estate, at the time the contract is entered into, no inadequacy of consideration will operate as a bar to the aid of equity in favor of the purchaser.

16. Thus in a case (*s*) where a common was to be inclosed, one man having a right of common, agreed, before the commissioners had made any allotment, or any one could know what it was to be, to sell his allotment for 20*l*. Afterwards it turned out to be worth 200*l*. Sir Joseph Jekyll said, the contract ought to be enforced, as no one could know what the allotment would be; and both parties were equally in the dark; *but it might be different if the circumstances had been known to the plaintiff*.

17. But, whether an estate is sold by auction, or by private agreement, equity will be as vigilant in discovering an excuse for refusing to perform the contract, where the price is inadequate, as it will where the consideration is unreasonable (*t*) (1).

18. A conveyance executed will not, however, be easily set aside on account of the inadequacy of the consideration; for there is a great difference between establishing and rescinding an agreement (*u*) (2). It is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, *equity will not relieve him upon this footing only, unless he can

(*r*) *Cadman v. Horner*, 18 Ves. jun. 10; *Wall v. Stubbs*, 1 Madd. 80.

(*s*) *Anon.* 1 Bro. C. C. 158; 6 Ves. jun. 24, cited; but see 2 Atk. 134.

(*t*) *Whorwood v. Simpson*, 2 Vern. 186; *Emery v. Wase*, 5 Ves. jun. 846; 8 Ves. jun. 505; *Twining v. Morris*, 2 Bro. C. C. 326; and see the cases cited

in n. (*a*), *supra*; and see *Mortlock v. Buller*, 10 Ves. jun. 292; *Maddesford v. Austwick*, 1 Sim. 89, and 1 Mollox, 335.

(*u*) See *Dews v. Brandt*, Sel. Cha. Ca. 7; *Cases, Dom. Proc.* 1728; *Hamilton v. Clements*, *Cas. Dom. Proc.* 1766. See *Small v. Attwood*, You. 407, *supra*, ch. 4, s. 5.

(1) See *Hough v. Hunt*, 2 Ham. (Ohio.) 502; *Osgood v. Franklin*, 2 John. Ch. 1, 23; *Butler v. Haskell*, 4 Desaus. 651; *Hardeman v. Burge*, 10 Yerger, 202; *Thompson v. Jackson*, 3 Randolph, 504.

(2) See, in reference to this difference, *Osgood v. Franklin*, 2 John. Ch. 1, 23; *Mortlock v. Buller*, 10 Vesey (Sumner's ed.) 29 and in note; *White v. Damon*, 7 ib. 30 note; ante, 311, note; *Catheart v. Robinson*, 5 Peters, 264.

show fraud in the party contracting with him, or some undue means made use of to draw him into such agreement (x) (1). To set aside a conveyance, there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it (y). The truth is, that in setting aside contracts, on account of an inadequate consideration, the Court proceeds on fraud (2). In all such cases, however, the basis must be gross inequality in the contract, otherwise the party selling cannot be said to be in the power of the party buying; unless actual imposition is proved by gross inequality, other circumstances of fraud will pass for nothing; the basis must be gross inequality (z) (3).

(x) *Per* Lord Hardwicke, *Willis v. Jernegan*, 2 Atk. 251.

(y) *Per* Lord Thurlow in *Gwynne v. Heaton*, 1 Bro. C. C. 1; and see *Stephens v. Bateman*, 1 Bro. C. C. 22; *Floyer v. Sherard*, Ambl. 18; *Heathcote v. Paignon*, 2 Bro. C. C. 167, and the cases there cited; *Spratley v. Griffiths*, 2 Bro. C. C. 179, n.; *Low v. Bar-ehard*, 8 Ves. jun. 133; *Underhill v. Hor-*

wood, 10 Ves. jun. 269; 14 Ves. jun. 28; *Verner v. Winstanley*, 2 Scho. & Lef. 393; *Mac Ghee v. Morgan*, *Bruce v. Rogers*, *ib.* 395; *Darley v. Singleton*, *Wight*, 25; *Evans v. Brown*, *ib.* 102; *Ex parte Thistlewood*, 1 Rose, 290.

(z) *Per* Lord Thurlow, in *Gartside v. Isherwood*, 1 Bro. C. C. 558. [See 560, 561 and notes.]

(1) Referring to the language of the text, Mr. Justice Story says;—"But this language, if maintainable at all, requires many qualifications; for, if a person is of a feeble understanding, and the bargain is unconscionable, what better proof can one wish of its being obtained by fraud, or imposition, or undue influence, or by the power of the strong over the weak?" 2 Story Eq. Jur. §236; *Blackford v. Christian*, 1 Knapp, R. 77. "It is obvious," says the same learned author, "that weakness of understanding must constitute a most material ingredient in examining, whether a bond or other contract has been obtained by fraud, or imposition, or undue influence, for, although a contract, made by a man of sound mind and fair understanding, may not be set aside, merely from its being a rash, improvident, or hard bargain; yet, if the same contract be made with a person of weak understanding, there does arise a natural inference, that it was obtained by fraud, or circumvention, or undue influence." 2 Story Eq. Jur. §235; *Bunch v. Hurst*, 3 Desaus. 292; *Whelan v. Whelan*, 3 Cowen, 537; *Whitehouse v. Hines*, 11 Munf. 557; *Fonbl. Eq. B. 1*, ch. 2, §3 note (r); *Malin v. Malin*, 2 John. Ch. 238; *Whipple v. McClure*, 2 Root, 216; *Gartside v. Isherwood*, 1 Brown C. C. (Perkins's ed.) 560, 561, and notes; *McCraw v. Davis*, 2 Iredell Eq. 618; *Hunt v. Moore*, 2 Barr, 105; *Slocum v. Marshall*, 2 Wash. C. C. 397; *Kennedy v. Kennedy*, 2 Alabama, 574, 606; *Harding v. Handy*, 11 Wheaton, 104, 125; *Reinicker v. Smith*, 2 Har. & John. 422; *Cruise v. Christopher*, 5 Dana, 182. In *Farnam v. Brooks*, 9 Pick. 220, the court said;—"We understand the law to be, that no degree of physical or mental imbecility, which leaves the party legal competency to act, is of itself sufficient to avoid a contract or settlement with him."

(2) *Hardeman v. Burge*, 10 Yerger, 202; *Fripp v. Frupp*, Rice Eq. 84; *Seymour v. Delancey*, 3 Cowen, 445; *S. C.* 6 John. Ch. 222; *George v. Richardson*, Gilmer, 231; *McKinney v. Pinkard*, 2 Leigh, 149; *Gist v. Frazier*, 2 Litt. 118. Mere inadequacy of price is not sufficient ground for setting aside a sale, unless the inadequacy be so gross as to be, of itself, evidence of fraud. *Osgood v. Franklin*, 2 John. Ch. 1, 23; *Seymour v. Delancey*, 6 John. Ch. 222; *Coles v. Trecothick*, 9 Vesey (Sumner's ed.) 234; *Moth v. Atwood*, 5 *ib.* 845 and note (a), *Fonbl. Eq. B. 1*, ch. 2 §9, note (d) and (e).

(3) *Per* Kent, Chancellor, in *Osgood v. Franklin*, 2 John. Ch. 24.

19. In a case where the purchaser had by the rents received back the price he paid, and the degree of inadequacy was very great, although the purchaser was dead, and his devisees by their answer stated themselves to be ignorant of all the circumstances connected with the sale, yet the Court before the hearing appointed a receiver, and thus turned the representatives of the purchaser out of possession (a).

20. But a conveyance obtained for an inadequate consideration, from one not conscious of his right, by a person who had notice of such right, will be set aside, although no actual fraud or imposition be proved (b) (1).

21. So if advantage is taken of the distress of the vendor, the sale will be set aside (c) (2): and this was done in one case, although the purchaser was really put to great hazard, and was to be at great expense and trouble in many foreseen and unavoidable lawsuits about the estate, the issue of which was very doubtful (d).

*22. The reader will perceive that in this chapter a distinction is taken between contracts in *feri*, and contracts actually executed; but in the case of *Coles v. Trecothick* (e), Lord Eldon appears to have been of opinion, that no such distinction exists. He said, that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not a sufficient ground for refusing a specific performance (3).

23. In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable (f) (4).

(a) *Stilwell v. Wilkins*, Jac. 280.

(b) See *Evans v. Luellyn*, 2 Bro. C. C. 150; and the cases cited in the next note.

(c) *Herne v. Meers*, 1 Vern. 465; 1 Bro. C. C. 176, n.; *Gould v. Okenden*, 4 Bro. P. C. by Toml. 193; *Ferguson v. Maitland*, Gro. & Rud. of Law and Eq. p. 89, pl. 1; *Pickett v. Loggon*, 14 Ves. 215; *Murray v. Palmer*, 2 Scho. & Lef. 474; *Bowen v. Kirwan*, Rep. t. Sugd.

47.

(d) *Gordon v. Crawford*, before the House of Lords; Gro. & Rud. of Law and Eq. p. 92, pl. 16; *Printed Cases Dom. Proc.* 1730.

(e) 9 Ves. jun. 234; *sed qu.* and see the cases cited in this chapter.

(f) See 9 Ves. jun. 243; 2 Pow. Contr. 181; 3 Wooddes. 460, s. 7; *Gilb. Lex Praetor.* 291; 1 Treas. Eq. c. 11, s. 12, and Mr. Fonblanque's notes, *ibid.*

(1) See *Butler v. Haskell*, 4 Desaus. 651, 697; *Clitherall v. Ogilvie*, 1 Desaus. 250.

(2) *Osgood v. Franklin*, 2 John. Ch. 24; *Butler v. Haskell*, 4 Desaus. 651; *Bunch v. Hurst*, 3 Desaus. 273.

(3) But see ante, 311, in note.

(4) *Osgood v. Franklin*, 2 John. Ch. 1, 25, Per Kent, Chancellor

The heir of a family dealing for an expectancy in that family, is distinguished from ordinary cases, and an unconscionable bargain made with him, is not only to be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed (*g*)(1). There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir being in distressed and necessitous circumstances (*h*), which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate (*i*). Every case of this nature must, however, depend on its own circumstances; the Courts profess not to lay down any particular rules, lest devices should be framed to evade them (2).

(*g*) *Per* Lord Thurlow, 1 Bro. C. C. 10. See *Nott v. Hill*, 1 Vern. 167; 2 Vern. 27; *Berney v. Pitt*, 2 Vern. 14; *Earl of Ardglass v. Muschamp*, 1 Vern. 237; *Twisleton v. Griffith*, 1 P. Wms. 310; *Curwyn v. Milner*, 3 P. Wms. 293, n. (C); *Sir John Barnardiston v. Lingood*, 2 Atk. 133; *Baugh v. Price*, 1

Wills. 320; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Bernal v. Donegal*, 3 Dow, 133; *Blakeney v. Bagott*, 3 Bligh, N. S. 237. (*h*) *Sir John Barnardiston v. Lingood*, 2 Atk. 133.

(*i*) *Cole v. Gibbons*, 3 P. Wms. 290. See *Barnard*, Cha. Rep. 6.

(1) In *Boynton v. Hubbard*, 7 Mass. 112, it was decided that the contract made by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution, or devise, is a fraud upon the ancestor, productive of public mischief, and void as well at law as in equity. See 1 Story Eq. Jur. §343. But in *Varick v. Edwards*, 1 Hoffman Ch. Rep. 383, 395—405, it was declared by the Ass. V. Chancellor, after an elaborate examination of the authorities, that Chancery will support the sale of the expectation of an heir of an inheritance in real as well as personal estate, if made *bona fide*, and for a valuable consideration. See 2 Kent (6th ed.) 475 in note.

(2) "Courts of equity, in cases of this sort," says Mr. Justice Story, "have extended a degree of protection to the parties, approaching to an incapacity to bind themselves absolutely by any contract, and, as it were, reducing them to the situation of infants, in order to guard them against the effects of their own conduct. Hence it is that in cases of this sort, it is incumbent upon the party dealing with the heir, or expectant, or reversioner, to establish, not merely, that there is no fraud, but, (as the phrase is) to make good the bargain; that is, to show, that a full and adequate consideration has been paid. For, in cases of this sort, (contrary to the general rule,) mere inadequacy of price or compensation is sufficient to set aside the contract. The relief is granted on the general principle of mischief to the public, without requiring any particular evidence of imposition, unless the contract is shown to be above all exception." 1 Story Eq. Jur. §336. "The relief is founded in part upon the policy of maintaining parental and quasi parental authority, and preventing the waste of family estates. It is also founded in part upon an enlarged equity, flowing from the principles of natural justice, upon the equity of protecting heedless and necessitous persons against the designs of that calculating rapacity, which the law constantly discountenances; of succoring the distress, frequently incident to the owners of unprofitable reversions; and of guarding against the improvidence, with which men are commonly disposed to sacrifice the future to the present, especially when young, rash, and dissolute." 1 Story Eq. Jur. §335. See *Fonbl. Eq. B. 1*, ch. 2, §12, note (k); *Gwynne v. Heaton*, 1 Bro. C. C. (Perkin's ed.) 10, 11 and notes; *Boynton v. Hubbard*, 7 Mass. 112; *Osgood v. Franklin*, 2 John. Ch. 1, 25; *Bernal v. Donegal*, 1 Bligh,

24. The circumstance of the heir being unprovided for, will not prevail much in the purchaser's favor: the remoteness or uncertainty of the interest is not material, if the terms be unreasonable, nor can much stress be laid upon the purchaser incurring the risk of the loss of his money, in case the heir die before he come into possession; nor will the acquiescence of the seller during the continuance of the same situation in which he entered into the contract prejudice him (*k*).

25. The adequacy of the consideration is considered with reference to the time of the contract and not to the event, and the burden lies on the *purchaser* in these cases to show that a full and adequate consideration was paid (*l*) (1). It is, however, competent for the Court at the hearing to direct an inquiry as to the value, if it think fit (*m*) (2).

26. But transactions between a father and son are treated as family arrangements, and not as dealings for reversionary interests (*n*).

27. A very anxious protection is also extended by equity to persons selling reversionary interests, who are not heirs, although certainly the same reasons do not occur in support of it (*o*) (3).

28. And although the bargain include property in possession, yet if the bulk of the property is reversionary, the whole contract will be set aside (*p*).

29. So where a loan is effected under the mask of trading, and an extraordinary rate of interest is in that way gained, the Court will relieve against the transaction, particularly in the case of an expectant heir (*q*). In the late case of *King v. Hamlet*, the heir was not relieved, although after a treaty for a loan, goods to the

(*k*) *Gowland v. De Faria*, 17 Ves. jun. 20; *supra*, ch. 4, s. 5.

(*l*) *Gowland v. De Faria*, *ubi sup.*; *Evans v. Griffith*, *Farmer v. Wardell*, 17 Ves. jun. 24, cited; *Medlicott v. O'Donel*, 1 Ball & Beatty, 136; *Kendall v. Beckett*, 2 Russ. & Myl. 88; *Addis v. Campbell*, 1 Beav. 258.

(*m*) *Heron v. Heron*, 2 Atk. 160; *Tweddell v. Tweddell*, Turn. & Russ. 1; *Wallace v. Wallace*, 2 Dru. & War. 452.

(*n*) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 456.

(*o*) *Wiseman v. Beake*, 2 Vern. 121; *Cole v. Gibbons*, 3 P. Wms. 290; *Bawtree v. Watson*, 3 Myl. & Kee. 339; see *Woodroffe v. Allen*, 1 Hay. & Jon. 73.

(*p*) *Lord Portmore v. Taylor*, 4 Sim. 182.

(*q*) *Barker v. Vansommer*, 1 Bro. C. C. 149.

(N. S.) 594; *Ryle v. Brown*, 13 Price, 758; *Fitch v. Fitch*, 8 Pick. 480; *Butler v. Haskell*, 4 Desaus. 487, 488.

(1) 1 Story Eq. Jur. §336; *Lord Aldborough v. Trye*, 7 Clark & Fin. 457, per Lord Cottenham.

(2) As to the mode of ascertaining the value of a reversionary interest, see *Earl of Chesterfield v. Janssen*, White's Lead. Cas. in Equity, 344, 402, 403.

(3) See 1 Story Eq. Jur. §337, §338.

value of 8,000*l.* were sold at the shop prices to an expectant heir, who had sold his only immediate provision, and a mortgage and other securities were taken as upon an actual advance of 8,000*l.* in money, carrying five per cent. interest from the time of sale, although it was proved that where ready money was paid (and here the security carrying interest was equal to ready money), a rebate of five per cent. was allowed in the ordinary way of trade by the defendant, which would have amounted to 400*l.*, but no such allowance was made to the plaintiff, and his goods were detained until the securities were perfected. The goods were of course resold, and the plaintiff sustained a loss of about 60 per cent. upon the transaction (*r*).

*30. The Court in deciding this case laid down two propositions as incontestable, as applicable to the doctrines of equity upon the subject of an expectant heir dealing with his expectancy.

1. That the extraordinary protection given in the general case must be withdrawn if it shall appear that the transaction was known to the father or other person standing in *loco parentis*; the person, for example, from whom the *spes-successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him (1).
2. That if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not in any respect act upon it so as to alter the situation of the other party or his property; at least that if he does so the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing (2).

Now the first of these rules is supported by no previous authority, and as a general rule cannot, it is submitted, be maintained. The knowledge of the parent *may*, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although

(*r*) *King v. Hamlet*, 4 Sim. 231; 2 My. & Kee. 456. See the reasons for the appellant in App. No. 9.

(1) A covenant by an heir expectant, that he will convey the estate, which shall come to him by descent or otherwise, is valid, if made with the consent of the ancestor, and for a sufficient consideration, and without advantage being taken of the covenantor. *Fitch v. Fitch*, 8 Pick. 480; *Trull v. Eastman*, 3 Metcalf, 121.

(2) See ante, 275, 276; 1 Story Eq. Jur. §346.

his father may witness his ruin with indifference. It is the son's equity, although partly grounded upon public policy. In many cases the person standing in *loco parentis*, or from whom the *spes-successionis* is entertained, or after whom the reversionary property is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them—which is simply accomplishing the purpose for which they were bought,—it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction.

31. A *bona fide* sale of a reversionary estate cannot be set aside, whether the vendor be an heir or not (*s*), unless fraud or imposition *be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale (*t*), although in the case of *Gowland v. De Faria* it was deemed sufficient to avoid the contract (*u*), that the consideration was not equal to the calculated value in the tables (*1*).

32. That case was the sale of an annuity secured upon the reversion, with a warrant of attorney and judgment, and therefore clearly distinguishable from a sale of the reversion. The evidence of Mr. Morgan, the actuary for the plaintiff, the seller, proved the price to be greatly inadequate, and according to the report, there was no evidence for the purchaser. Sir William Grant held that, according to the authorities, the purchaser was to show that a full and adequate consideration was paid. Upon the question of the adequacy of the consideration, the evidence was all one way. In many of these cases very opposite opinions are given by calculation, but here the plaintiff's witness was not contradicted. He must, therefore, take the value to be inadequate, and then he did

(*s*) *Dews v. Brandt*, Sel. Ca. Cha. 8; *cock v. Evans*, 16 Ves. jun. 512; *Ryle v. Brown*, 13 Price, 758; *Lord Portmore v. Allen*, 1 Hay. & Jon. 73. Taylor, 4 Sim. 182.

(*t*) *Nichols v. Gould*, 2 Ves. 422; (*u*) *Gowland v. De Faria*, 17 Ves. jun. Gwynne v. Heaton, 1 Bro. C. C. 1; Pea- 20.

(1) See *Earl of Chesterfield v. Janssen*, White Lead. Cas. in Equity, 344, 402, 403; *Lord Aldborough v. Trye*, 7 Clark. & Fin. 457.

not see how he could avoid setting aside the contract. The decision was appealed from, but the suit was compromised by the seller paying to the purchaser the costs, and a sum of money beyond the sum decreed to him at the Rolls.

33. The rule supposed to have been laid down in the above case would have a strong tendency to stop altogether the sale of reversions; but as this is not possible, it would have the effect of preventing the sale of reversions at their fair market value. It is perfectly well known that reversions upon sales, even by auction, fetch on an average only two-thirds of the sum at which they are valued in the tables: according to the case of *Gowland v. De Faria* (r), this does not seem to operate in a purchaser's favor, although the value of a thing is at last not to be regulated by calculation, but, as it is vulgarly termed, by what it will fetch. Experience has shown, that, under the most favorable circumstances, reversions will not fetch their calculated value, which only allows the purchaser five per cent interest, notwithstanding that his money may be locked up for many years. It seems, therefore, an equity not founded on reason or convenience, which in these cases inquires the calculated value of the subject of the contract, instead of its value according to the well known market price. The effect of such an equity must ultimately be to injure the very persons in *whose favor it was introduced. Reversions will never fetch their calculated value. Fair purchasers will not dare to purchase them at their market price, and consequently they will be thrown into the grasp of usurers, who will give very inadequate considerations for them, running the risk of a suit, in which event they will stand in as good a situation as if they had given the fair market price for them.

34. The true rule appears to have prevailed in an early case (y). A son, thirty years of age, tenant in tail in remainder expectant on his father's life estate, contracted to sell it at somewhat less than half of its present value when he came into possession, and interest was to be paid in the meantime. The father died within two years, but the Court refused to relieve the son. The Court truly observed, that a rule that an heir should not dispose of a reversion would be, that an heir should never be of age. If the bargain had been to pay when the possession had, that would have been a purchase in possession, and on account of the great undervalue bad. Had the

(r) See *Ex parte Thistlewood*, 1 Rose, 182; *Whicheote v. Bramston*, *ib.* 202, n. 290; *Lord Portmore v. Taylor*, 4 Sim. (y) *Dews v. Brandt*, Sel. Cha. Ca. 7.

bargain been to pay so much down in present money, undoubtedly it had been good, *else there was an end of all sales of reversions, and a man would be tantalized with having an estate of which he could make no use.* The payment of the interest they considered the same as buying the reversion for present money paid, and the agreement could not be affected by the accident of the early death of the father. That was a chance on both sides, and might have happened otherwise.

35. Sir W. Grant, in acting upon the rule, considered that to the class of expectant heirs the Court seemed to have extended a degree of protection approaching nearly to an incapacity to bind themselves by any contract (z) (1).

36. But *Gowland v. De Faria* has not been approved of, and later cases place the doctrine upon the right footing, and the Court will, in estimating the value, look at the real market as well as the calculated value, in order to ascertain whether the price be a fair one (2).

37. In a case in Ireland, before Hart, L. C. (a), he observed that he was not satisfied at the time, nor was he then, that *Gowland v. De Faria* was decided on the true principles of equity; but the ground upon which his objection turned seems to have been the length of time which had elapsed. There were, he stated, material facts in that case, which do not appear in the printed report, going further to disentitle the plaintiff. He was not a mere expectant *when he made the contract, but a man in possession of a considerable income. He expected an accession, but he was opulent and he was prudent, for he raised that money not to squander it, but to lay it out profitably in the improvement of his estate. Sir A. Hart added, that he advised an appeal from that decree; and it would have been appealed from, but the plaintiff submitted to a compromise.

38. In *Hincksman v. Smith* (b), before Sir John Leach, Master of the Rolls, he observed that, in *Gowland v. De Faria*, Sir W. Grant did not consider himself as laying down a new rule, but as following the current of authority, and since that case the rule had been so far regarded as the settled law of the court; that

(z) *Peacock v. Evans*, 16 Ves. jun. 512. (1828).

(a) *Scott v. Dunbar*, 1 Moll. 458 (b) 3 Russ. 433 (1827).

(1) See 1 Story Eq. Jur. §336.

(2) See *Earl of Chesterfield v. Janssen*, White Lead. Cas. in Equity, 344, 402, 403, and cases cited.

although he (Sir John Leach) had *upon more than one occasion judicially questioned both the principle and policy of the rule* (1), yet it would not become that Court to make a precedent in direct opposition to it. But he decided the case upon other grounds.

39. In a recent case (c) before Chief Baron Alexander, he refused to set aside a private sale of a reversionary interest, although Mr. Morgan the actuary's valuation was 928*l.* 8*s.*, and the price paid was only 630*l.*, rather more than two-thirds of the calculated value. The learned judge could not bring himself to adopt the principle laid down in *Gowland v. De Faria*. He observed, that in the case before him the price agreed on and actually paid was in his opinion the utmost that, according to every human probability, could have been obtained. He did not dispute Mr. Morgan's valuation, but the price put by the actuary can never be procured in fact; the witnesses for the defendant prove it, and it requires no witnesses. The price set was the arithmetical value. Now no man will part with his ready money, and all the advantages which the power over it confers, in exchange for a future interest, without some compensation beyond the dry arithmetical value of it. To set this bargain aside would be in effect to decree that no valid bargain for a reversion can be made except by auction; and he did not know how any other sale of such an interest could be sustained, unless judges proceeded on the same principle as he did. This would be a very inconvenient restraint on the power of the owners of such property. A private sale is no doubt, sometimes, an imprudent exercise of that power; but in many situations, and under circumstances of no unfrequent occurrence, it is wise and provident. Every case should turn on its particular circumstances; and he thought there were none in the present case which, either *according to sound sense, or to any established course of precedents, affected it.

40. In the case of *Potts v. Curtis* (d), the bill was to compel a transfer of some stock, the reversion of which had been purchased by private contract by the plaintiff. The purchase was made in 1812 for 550*l.* The claim was resisted upon the allegation of inadequacy of consideration. The plaintiff examined two auctioneers to prove the value. The defendant examined two actuaries, an auctioneer, and a land agent; and in the result the purchase

(c) *Headen v. Roshier*, 1 M'Clel. & You. 89 (1825). (d) *You.* 513 (1832).

(1) See 1 Story Eq. Jur. §338.

was supported. This case, for the first time, fairly introduced the question between the conflicting evidence of auctioneers and actuaries, or, in other words, between the market price of reversions, and their estimated value according to the tables. Lord Lyndhurst observed, that he had made a calculation as to the inadequacy. If the two calculations of Morgan and Ansell, the actuaries, and the average of their results be taken on the one side, and the calculations of the two witnesses for the plaintiff, and the average of their results be stated on the other side, and then the average of the whole, two on one side, and two on the other, be taken, the result is 597*l.*, that is, 47*l.* more than the price actually paid. It was quite clear that Sir William Grant, in *Gowland v. De Faria*, paused a moment as to an actuary's valuation; but then, he says, "there is nothing opposed to it; it is not questioned, but it is admitted." He (Lord Lyndhurst) took that as the basis upon which he should proceed. It was equally clear, he seemed to think, a question might arise as to whether an actuary's valuation was the real value. Sir William Alexander, in *Headen v. Rosher*, states that the sum at which an actuary values a reversion never can be obtained. He (Lord Lyndhurst) supposed it could not; for why should a party choose to lock up his money at the ordinary interest? Some deduction therefore should be made on that account; but in this case, making no deduction, and taking the valuations on both sides, the average is only 47*l.* more than the money paid for the reversion. It was unnecessary for him to say what was the extent of the inadequacy of consideration which would vitiate a contract of this kind, for it did not appear to him that the consideration was inadequate when the subject was fairly considered. Undoubtedly in this case, Mr. Morgan and Mr. Ansell, who were both actuaries, and accustomed to make calculations of this description with great accuracy, stated that they calculated the value of this reversion at considerably more than the sum that was agreed to be paid for it. This brought him (Lord Lyndhurst) to the consideration *of the doctrine in *Gowland v. De Faria*. In that case there was a calculated value, and the Master of the Rolls not finding that calculated value opposed by any evidence, considered he was bound by it; and the calculated value being much more than the sum paid, he considered the contract was altogether void. But he (Lord Lyndhurst) thought the observations made upon that case by Sir William Alexander, very judicious and very proper. He says, "Calculated value is never actual value, and no person sell-

ing a reversionary interest can ever expect to get the calculated value." And his reason is extremely good and satisfactory. Sir William Alexander, therefore, would have come to the conclusion probably in *Gowland v. De Faria*, that according to his experience, he would not have been bound, as the Master of the Rolls conceived himself to be, by the evidence of the calculated value. The Master of the Rolls thought that the calculated value being opposed by no other evidence, was conclusive upon him. According to his (Lord Lyndhurst's) understanding of the judgment of Sir William Alexander, he would not have considered himself so bound; he would have exercised his own understanding and experience, and made certain deductions from the calculated value; but in the present case they have evidence not merely of the calculated value, but evidence independent of it. Now, the evidence of the two most experienced witnesses on the part of the defendant, those on whose judgment he should be disposed most to rely, Mr. Morgan and Mr. Ansell, was, that the calculated value amounted to 744*l.* If you deduct, according to common experience, a third from the calculated value, the proportion to which as the average price obtained (*e*), it would reduce the 744*l.* to 496*l.*, whereas the sum here contracted for amounted to 550*l.* But the evidence on the other side, of Mr. Fairbrother, was, that it was not worth to sell more than 530*l.*: the evidence of Mr. Abbott, that it was not worth more than 500*l.* Taking, therefore, the evidence of Mr. Fairbrother, and the evidence of Mr. Abbott, who were experienced persons in selling property of this description, and contrasting that with the calculated value, the estimate they put upon the property was something more than two-thirds of the calculated value, and something less than the money actually given for the property.

41. In *Newton v. Hunt*, where Sir L. Shadwell, V. C., relieved against a sale by private contract at an undervalue, he observed, that it was insisted that the doctrine laid down in *Gowland v. De Faria* was overruled by the decision in *Headen v. Rosher*. *But it was observable that in *Headen v. Rosher*, the only evidence given by the plaintiffs was the opinion of Mr. Morgan, and for reasons which the V. C. stated, little reliance could be placed upon that opinion as evidence of value, whereas the defendant's evidence went directly to prove that the price given by him was a fair price. And there was nothing in the case of *Headen v. Rosher* from which

(*e*) Sugd. Vend. & Purch. 239; [*supra*, p. 317, pl. 33.]

it could be inferred that any advantages had been unduly taken of the plaintiff by the defendant. That case was decided in 1825 ; and in 1827, the case of *Hinxman v. Smith* occurred, in which Sir John Leach, Master of the Rolls, made the observations before quoted. He (the V. C.) could not, therefore, consider the judgment of the C. B. in *Headen v. Rosher* as having set aside the authority of *Gowland v. De Faria*, even with respect to inadequacy of price alone. Sir William Grant however had before him a case in which the defendant did take advantage of the plaintiff's difficulties.

42. The decision of the case of *Headen v. Rosher* may be capable of being referred to the grounds stated by the Vice-Chancellor ; but Chief Baron Alexander clearly intended to decide that the market value, and not the calculated one, is the true guide in these cases ; and so the decision was understood by Lord Lyndhurst, C. B.

43. In a recent case before the Vice-Chancellor (*f*), where the interest sold was a perpetual rentcharge, which the seller, although an heir, was enabled in effect to sell in possession, but a question arose upon value, and two actuaries for the seller gave the same evidence as to value, and were contradicted by two auctioneers and a surveyor for the purchaser, as to the market value or price by public auction ; the Vice-Chancellor, in contrasting the evidence, observed, that both the actuaries singularly enough concurred in stating (probably they looked only at the tables) that a sum named was the value at the time of sale, but although cross-examined as to the market value, they did not depose. But the other three persons spoke of the market value, and two of these witnesses added, that their estimate was made with reference to the state of the money-market (which was a very material circumstance) at the time of the sale, which they said was a very unfavorable time for the sale of property such as that in question.—All the Judges therefore seem now to take the same view of this question, for the same point arose in *Wardle v. Carter* as in the other cases, viz. which is to be looked at, the calculated value or the market price, and it makes no difference whether the rule is *applied to a reversion or to a subject like a rentcharge in possession, although when the value is ascertained, a consideration might be deemed adequate in the one case, which would be inadequate in the other.

44. In a late case in the House of Lords (*g*) the later authorities were fully reviewed and established, so that now in such cases, the question is, Was the fair market price given ?

45. In a case (*h*) where a tradesman for 30*l.* paid at the time of the agreement, and 570*l.* further part of 770*l.* to be paid at the time of the conveyance, sold eight-twelfths of a property in remainder expectant upon his father's death, and 200*l.* was to be retained by the purchaser, in order that if he were obliged upon the purchase of the remaining shares to give more than 100*l.* a piece, he might reimburse himself the excess, and pay the residue to the seller, and he was to pay interest on the 200*l.* in the meantime, the bill was filed by the purchaser for a specific performance.

The witnesses differed as to the value, but the Lord Chief Baron dismissed the bill as too favorable a bargain for the purchaser. The plaintiff's witnesses were farmers and tradesmen, and in the opinion of the Court they overvalued the father's life interest. It was, the Chief Baron said, thrown upon the plaintiff to make out a case of adequacy, in order to entitle himself to a decree, and he had not done it in the way he ought ; it was incumbent on him to have a valuation of the property made by a competent valuator, and an actuary should have stated what was the value of the father's life interest, and what would have been a fair consideration for the reversionary interest upon a view of all the circumstances. He thought no man capable of dealing prudently for his own interests (and the seller's condition was represented to be that of extreme indigence, ignorance, imbecility of intellect, and habitual inebriety), could have acceded to the stipulation as to the 200*l.*, by which it in fact depended upon the conduct of the vendee of the estate whether he should ever receive more of the residue of the purchase-money or not.

46. Upon the evidence of surveyors as to value, Lord Lyndhurst has observed, that he had been so long accustomed to courts of justice and to evidence of that description, he had seen so much of its flexible character, and its means of adapting itself to the interest of the party on whose behalf the evidence is given, that he placed very little reliance upon evidence of this nature (*i*).

*47. In a late case (*k*), Sir John Leach held that the rule did not extend to sales by auction. He said, that the principle of the rule

(*g*) Lord Aldborough v. Trye, 7 Cl. & Fin. 436.

(*i*) See You. 491.

(*h*) Ryle v. Swindells, M'Clel. 519.

(*k*) Shelly v. Nash, 3 Madd. 232. See Fox v. Wright, 6 Madd. 111.

could not be applied to sales of reversion by *auction*. There being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The sale by auction is evidence of the market price. It was said, that pretended sales by auction may be used to cover private bargains; where such cases occur they will operate nothing. It has been truly observed, that this case establishes the above-mentioned proposition, that the market price is the thing to be looked at; for if the market price is not the thing to be looked at, how is it established that a sale by auction is within the rule, for a sale by auction is a means of ascertaining the market price (*l*) (1).

48. And if a sale by private contract of one lot be oppressive, it may be relieved against, although the lot be assigned by the same instrument with another lot sold by public auction, in respect of which no relief can be granted (*m*).

49. It has also been held, that the rule does not apply to a sale by a father, tenant for life, and his son tenant in tail in remainder, for they form a vendor with a present interest, and meet a purchaser with the same advantages as if a single person had the whole power over the estate (*n*).

50. So where the seller had an annuity of 500*l.* a year for the joint lives of himself and his father, remainder to his father for life, with remainder to himself in fee; a sale by him of a perpetual rentcharge of 500*l.* was supported, as he stood in the situation of a person, who, if the purchaser did not make the objection, might be considered as capable of selling a perpetual rentcharge of 500*l.* a year in possession (*o*).

51. So again, the case of a mere expectant, entirely without present enjoyment, differs from the case of a man in possession, and who having the rents and profits, bargains with his tenant for an extension of his term, and equity has no business to meddle with such a case as this more than with any ordinary transaction. One having the absolute dominion is not bound to wait until the actual expiration of a term to make a new contract, nor is that the kind of reversionary interest which courts of equity have ever protected in this way (*p*).

(*l*) 7 Cl. & Fin. 460, *per* Lord Chancellor.

(*m*) *Newton v. Hunt*, 5 Sim. 511 (1833).

(*n*) *Wood v. Abrey*, 3 Madd. 417;

Cooke v. Burtchell, 2 Dru. & War. 165.

(*o*) *Wardle v. Carter*, 7 Sim. 490.

(*p*) *Per* Hart, L. C. in *Scott v. Dunbar*, 1 Moll. 459.

(1) See 1 Story Eq. Jur. §338.

*52. In *Baker v. Bent* (*q*), where the bill was filed to set aside for undervalue a sale of a reversion expectant upon the death of a tenant for life without issue male, and subject to charges in other events, the Master of the Rolls said, that the probability that a testator of sixty-three will marry and have issue, depending upon the habits and disposition of the party, and the accidents of life, is not the subject of estimate or calculation, and he put out of his consideration all evidence which affected to set a value on that contingency. But as, in the case before him, the purchaser at the beginning of the treaty was not aware that such a contingency existed, and he put a value upon the plaintiff's interest, as if the reversion were actually to take effect upon the death of the tenant for life; and when he afterwards discovered the contingency he proposed to deduct one half of the sum he had just offered, and that proposal was ultimately the basis of the agreement; the learned Judge referred it to the Master to inquire, what was the value of the reversion, supposing it had been to take effect certainly at the death of the tenant for life, and by declaring that one half of such value is to be deducted in respect of the contingency.

53. It must not, however, be understood, that because there is a contingency which is not strictly the subject of valuation, a purchaser can sustain a purchase at an undervalue.

54. It has been laid down as a general rule, that when one purchases an annuity or a reversionary interest, or in expectancy, if that is quarrelled with, on the ground that the grantee or vendee did not pay the full valuable consideration stipulated to be paid by the deed, and the fact be so, the Court will set that aside as an annuity, or sale of a reversionary or expectant interest, and cut it down to a loan (*r*).

55. The practice has been condemned of signing an attestation of payment of the purchase-money, where no money passes (*s*). But a mere mis-statement of the consideration would not in itself be sufficient to vitiate a contract. Conveyancers are in the habit of stating the consideration in deeds differently from what it really is. To give a familiar instance, suppose a purchaser of an estate, who has not the whole of the purchase-money ready to pay down, and the parties agree that a portion of it shall remain in his hands, and be secured by a mortgage on the estate; the deed may state

(*q*) 1 Russ. & Myl. 224; see *Sherwood v. Robins*, 1 Mood. & Malk. 194.

(*r*) *Drought v. Eustace*, 1 Molloy, 328.

(*s*) See 1 Molloy, 339.

the entire sum to be paid, and a receipt may be signed and indorsed on the conveyance for the whole sum, and by a subsequent deed of *the next day, reciting that so much of the purchase-money remains unpaid, the estate may be mortgaged for the residue, yet such a mis-statement will not vitiate the contract, but in such a case the consideration is in accordance with the actual agreement of the parties; it is not the case of one consideration bargained for and another given, so that a mere false statement would not in itself necessarily vitiate a deed. But false statements must always have great weight, and there may be cases where a false statement of itself may destroy the whole transaction (*t*).

56. It must be remarked, that we have no certain rule by which the inadequacy of a consideration can be ascertained. Our law, indeed, hath in one instance (*u*) adopted the rule of the civil law; by which no consideration for an estate was deemed inadequate which exceeded half the real value of the estate (1); and Lord Nottingham wished the rule universally prevailed in England (*v*).

57. If a bill for relief be delayed for a great length of time (*y*) (2), or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase (*z*) (3), equity will not relieve against the sale, although the aid of the Court could not originally have been withheld.

58. Where a sale is set aside on account of the inadequacy of the consideration, it is upon the principle of redemption, and the conveyance will stand as a security for the principal and interest, and even costs (*a*) (4); but compound interest will not be allowed,

(*t*) *Bowen v. Kirwan*, Llo. & Goo. t. Sugd. 66, 67; *Gibson v. Russell*, 2 You. & Col. C. C. 104.

(*u*) *Vide Duke*, 177; *et infra*, ch. 22; and see *Baldwin v. Rochfort*, 2 Ves. 517, cited.

(*v*) See *Nott v. Hill*, 2 Cha. Ca. 120; 1 Treat. Eq. 119; *Grotius de jure Belli ac Pacis*, L. 2, c. 12, s. 12.

(*y*) *Moth v. Atwood*, 5 Ves. jun. 815; but see *Roche v. O'Brien*, 1 Ball. & Beatty, 330.

(*z*) *Cole v. Gibbons*, 3 P. Wms. 290; *Chesterfield v. Janssen*, 1 Atk. 301; 2 Ves. 549. See *Baugh v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. jun. 355;

Roche v. O'Brien, 1 Ball & Beatty, 330; *supra*, ch. 4, s. 5.

(*a*) *Twisleton v. Griffith*, 1 P. Wms. 310; *Gwynne v. Heaton*, 1 Bro. C. C. 1; *Peacock v. Evans*, 16 Ves. jun. 512; *Bowes v. Heaps*, 3 Ves. & Bea. 117; but in *Nicols v. Gould*, 2 Ves. 423, Lord Hardwicke thought he could not set aside the purchase without making the purchaser pay costs; and see *Baugh v. Price*, 1 Wils. 320; *Gowland v. De Faria*, 17 Ves. jun. 20; *Morony v. O'Dea*, 1 Ball & Beatty, 109, and the Reporters' note; *Hilliard v. Gambel*, Tomly. 375, n.; *Wood v. Abrey*, 3 Madd. 117; *Bautrie v. Watson*, 3 Myl. & Kee. 339.

(1) See *Seymour v. Delancey*, 6 John. Ch. 222.

(2) *Ante*, 275, 277.

(3) *Ante*, 275 to 277; 1 Story Eq. Jur. §345.

(4) 1 Story Eq. Jur. §344; *Boyd v. Dunlap*, 1 John. Ch. 478, 482, 483; *Sands v. Codwise*, 4 John. 536, 598, 599; *Gwynne v. Heaton*, 1 Brown C. C. (Perkins

however long the purchaser has been kept out of his money (*b*) ; in many cases, therefore, the seller is not merely relieved against the contract, but a considerable benefit is given to him at the expense of the purchaser. In a late case, where interest had been paid on the purchase-money, the payments were considered to be of principal and not interest, and the seller was charged with interest on *all the sums received by him, whether received as interest or as principal (*c*) (1).

59. So the purchaser will be allowed for lasting and valuable improvements, and will not, like a mortgagee, be charged with what without wilful default he might have made (*d*)(2).

60. If it be agreed, that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance *in specie* ; but if the referee do not act fairly, or a valuation be not carefully made, execution of the contract will not be compelled ; especially if there be any other ground upon which the Court can fasten, as a bar to its aid (*e*). But generally speaking, the question is not what is the real value, for the parties have made the arbitrator their judge in that point ; they thought proper to confide in his judgment, and must abide by it unless they can make it plainly appear that he has been guilty of some gross fraud or partiality (*f*) (3).

61. By the civil law, also, a price was considered sufficiently certain, if it was to be fixed by a person named, and such person accordingly fixed the sum : but it appears by the Institutes (*g*),

(*b*) *Gowland v. De Faria*, 17 Ves. jun. 20.

(*c*) *Murray v. Palmer*, 2 Scho. & Lef. 474 ; see ch. 4, s. 5.

(*d*) *Murray v. Palmer*, *ubi sup.*

(*e*) *Emery v. Wase*, 5 Ves. jun. 846 ; 8 Ves. jun. 505 ; *Hall v. Warren*, 9 Ves.

jun. 605 ; see *Gourlay v. Duke of Somerset*, 19 Ves. jun. 429.

(*f*) *Belchier v. Reynolds*, 2 Lord Keny. 2d part, 91, *per* Sir John Strange.

(*g*) III. xxiv.1. For the cases arising out of this rule, *vide* Vinnius, 674.

ed.) 11, and in note ; *Bernal v. Donegal*, 1 Bligh (N. S.) 594 ; *Boynnton v. Hubbard*, 7 Mass. 120 ; *Wharton v. May*, 5 Vesey (Summer's ed.) 27, note. But a deed, fraudulent in fact, is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity. *Sands v. Codwise*, 4 John. 536, 598, 599 ; *Boyd v. Dunlap*, 1 John. Ch. 482 ; *Fonbl. Eq. B. 1*, ch. 2, §13 and notes ; *Jones v. Hubbard*, 6 Munf. 261.

(1) See *Doggett v. Emerson*, 1 Woodb. & Minot, 195, 206.

(2) See *Richardson v. McKinson*, Litt. Sel. Cas. 285 ; *Craig v. Martin*, 3 J. J. Marsh. 55 ; *Bullock v. Beemiss*, 1 A. K. Marsh. 434 ; *Thompson v. Mason*, 4 Bibb, 197 ; *Morton v. Ridgeway*, 3 J. J. Marsh. 257 ; *Witherspoon v. Anderson*, 3 Desaus. 245 ; *McCracken v. Sanders*, 4 Bibb, 511 ; *Searcy v. Reardon*, 1 A. K. Marsh. 2 ; *Clay v. Miller*, 2 Litt. 280 ; *Williams v. Rogers*, 2 Dana, 375 ; *Pugh v. Bell*, 1 J. J. Marsh. 404 ; *Frink v. McKeoun*, 4 J. J. Marsh. 170 ; *Griffith v. Depew*, 3 A. K. Marsh. 180.

(3) See *Brown v. Bellows*, 4 Pick. 179 ; *Underhill v. Van Cortlandt*, 2 John. Ch. 339 ; *Pothier, Contracts of Sale*, p. 1, §2, art. 2 §2, pl. 24.

“*Inter veteres satis abundeque hoc dubitatur, constaretne venditio, an non.*”

62. Such arbitrators may take the opinion of a third person as evidence, but they cannot merely delegate their authority (*h*) (1).

63. If an agreement be made to sell at a fair valuation, the Court will execute it although the value is not fixed. For as no particular means of ascertaining the value are pointed out, there is nothing to preclude the Court from adopting any means adapted to that purpose (*i*).

64. But where parties agree upon a specific mode of valuation, as by two persons, one chosen by each, unless the price is fixed in the way pointed out, the Court cannot enforce the performance of the agreement, for that would be not to execute their agreement, but to make a new one for them. Therefore, where the agreement was to sell at a valuation by arbitrators, to be appointed, or their umpire, and arbitrators were appointed, and different as to value, and could not agree upon an umpire, the Court refused to interfere (*k*). An umpire we may observe must be *chosen*; a nomination by chance or lot is wrong, and the clerks of the attorneys are not competent to bind their principals and the parties by a consent to a nomination by lot (*l*).

65. As regards the necessity of having the price fixed, our law accords with the civil law (*m*). The same rule is adopted in the Code Napoleon (*n*). After stating that the price ought to be fixed by the parties, it adds, “*Il peut cependant etre laisse a l'arbitrage d'un tiers : si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente.*”

66. If therefore the medium of arbitration or umpirage is resorted to for settling the terms of a contract, and fails, equity has no jurisdiction to determine that though there is no contract at law, there is a contract in equity:—If the instrument assume that the award shall bind the parties personally, the death of one of them before the award will of course be a countermand of the submission at law, and equity cannot enforce the contract (*o*). So if the

(*h*) *Hopcraft v. Hickman*, 2 Sim. & jun. 34; *Pritchard v. Ovey*, 1 Jac. & Stu. 130; *Anderson v. Wallace*, 3 Clar. Walk. 396.

(*i*) See 14 Ves. jun. 407. (*l*) *In re Greenwood v. Titterington*, 9 Adol. & Ell. 699.

(*k*) *Milnes v. Gery*, 14 Ves. jun. 400; (*m*) *Vide supra*.

Gregory v. Mighell, 18 Ves. jun. 328; (*n*) Code Civil, Liv. 3, Tit. 6, ch. 1, s. 1592.

Gourlay v. Duke of Somerset, 19 Ves. jun. 429. See *Cooth v. Jackson*, 6 Ves. (*o*) *Blundell v. Brettargh*, 17 Ves. jun. 232; and see 6 Ves. jun. 34.

(1) See *Emery v. Wase*, 5 Vesey, 846; *Underhill v. Van Cortlandt*, 2 John. Ch. 348, 349.

arbitrators are named, and one party refuses to execute the arbitration bond, as it is not certain that any award will ever be made, equity will not interfere; for the relief sought is a specific performance by the defendant conveying at such price as the arbitrators named shall hereafter fix, and no award may ever be made (*p*) (*l*).

67. This proves that neither of the parties to such an agreement can be compelled to nominate an arbitrator under the agreement. The very point was decided in the case of *Agar v. Macklew* (*q*). A covenant was contained in a lease that the lessees might purchase the reversion at a valuation by two persons, one to be named by the lessor, and the other by the lessees, who were to name an umpire. The lessor refused to name an arbitrator, and upon demurrer it was held that the lessees could not file a bill for a specific performance, or to compel the lessor to nominate an arbitrator (*l*).

*68. But where the seller and purchaser mutually agree to refer the price to a third person named in the agreement, and the seller covenanted for herself and her heirs to surrender the estate to the purchaser, and the purchaser covenanted for himself, his executors, &c., to pay her the money, the agreement was enforced although the seller died before the award, because the Court said this was an agreement to be executed by the parties or their representatives, and not an authority to be determined by their deaths (*r*).

69. And a party may bind himself by acquiescing in an award not made in the manner required (*s*). And in a case where the contract of sale was for twenty-five years' purchase, on an annual value to be fixed by a certain day, by referees named, and the seller prevented the valuation from being made, it was held that he should not be allowed to avail himself of his own wrong. The Court would compel him to permit the valuation to be made according to the contract (*t*).

70. If a party having agreed to sell at a price to be fixed by

(*p*) *Wilks v. Davis*, 3 Mer. 507; *Daly v. Duggan*, 1 Ir. Eq. Rep. 311.

(*q*) V. C. 9 Nov. 1825, MS.; 2 Sim. & Stu. 154, S. C.

(*r*) *Belchier v. Reynolds*, 2 Lord Keny. 2d part, 87.

(*s*) See 17 Ves. jun. 241.

(*t*) *Morse v. Merest*, 6 Madd. 26.

(I) For the new powers given to arbitrators appointed by rule of Court, or the like, see 3 & 4 Will. 4, c. 42, s. 39, 40, 41, England; 3 & 4 Vict. c. 105, s. 63, 64, 65, Ireland.

(1) See *Tobey v. County of Bristol*, 3 Story C. C. 800; 1 Story Eq. Jur. §103.

referees who are named, without cause revoke his authority before the price is fixed, equity will not interfere by injunction to prevent the purchaser from taking possession or the like under the agreement, for it is said a plaintiff is not at liberty to ask the aid of a court of equity in respect of an act done by him against good faith (*u*).

71. Where two persons agreed that a moiety of a piece of land (of which one of them had the other moiety, and the entirety of which when obtained was to be subject to certain stipulations between them), should not be purchased by either of them until they had agreed upon a sum to be given for it; it was held that neither of them had a right to say "This agreement shall never be carried into effect, because I will never agree on a price; I will not only prevent the performance of the agreement, but will prevent you from ever becoming owner of the land either with me or independently of me" (*x*) (1).

72. Where the award is actually made, and the contract to refer is made by agreement a rule of Court, yet an attachment will not be granted, but the parties will be left to their remedy by action under the contract (*y*).

(*u*) *Pope v. Lord Duncannon*, 9 Sim. 177. The price was fixed by two of the three arbitrators, which was within the authority, but after the revocation. See

Harcourt v. Ramsbottom, 1 Jac. & Walk. 511.

(*x*) *Morris v. Timmins*, 1 Beav. 411.

(*y*) *In re Lee and Hemingway*, 3 Nev. & Man. 860.

(1) But if an agreement be made, subject to a condition that the price thereof shall be afterwards ascertained by the parties, and one of the parties die without any price being agreed upon, such agreement is too incomplete and uncertain to be carried into execution by a court of equity. *Graham v. Call*, 5 Munf. 396.

*SECTION II.

OF THE FAILURE OF THE CONSIDERATION BEFORE THE CONVEYANCE.

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|---|---|
| <p>1. <i>Purchaser to bear loss by fire, &c. after contract.</i></p> <p>7. <i>Not where purchase under decree not confirmed absolute.</i></p> <p>8, 15. <i>Purchaser entitled to benefit.</i></p> | <p>10. <i>Wyvill v. Bishop of Exeter.</i></p> <p>11. <i>Observations upon that case.</i></p> <p>13. <i>Validity of title.</i></p> <p>14. <i>Deeds destroyed by fire.</i></p> <p>16. <i>Lives dropping in.</i></p> |
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| 18. Insurance. | <i>purchase-money.</i> |
| 19. Sale for life annuity: purchaser entitled though life drops. | 29. Sale of life annuity enforced though life drops. |
| 27. Where seller may retain estate and | 31. Seller to become tenant. |

1. A VENDEE, being equitable owner of the estate from the time of the contract for sale (1), must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim (a).

2. Nevertheless this doctrine, however it may seem to flow from the rules mentioned in the preceding chapter, has never been decided till lately.

3. For in *Stent v. Baily* (b), the master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for the same the house be burnt down by casualty of fire, I shall not in equity be bound for the house" (c) (2).

4. So upon a sale of a leasehold for lives (d), previously to the conveyance, one of the lives dropped; and although Lord Keeper Wright decreed a specific performance, yet the report states, that he seemed to think, that if *all* the lives had been dropped before the conveyance, it might have been another consideration, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance.

5. The case of *Cass v. Rudele*, as it is reported in *Vernon* (e), is an authority against the *dictum* of the Master of the Rolls, in *Stent v. Baily*; but it appears (f) that the case is mis-stated in **Vernon*, and that the decree was founded on a good title having been conveyed.

6. In a late case (g), however, where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor

(a) See 2 Pow. on Contracts, 61.

(b) 2 P. Wms. 220; see *Bacon v. Simpson*, 3 Mees. & Wels. 78.

(c) As to accidents before the contract, unknown to the parties, see p. 71.

(d) *White v. Nutt*, 1 P. Wms. 62.

(e) 2 Vern. 280.

(f) See 1 Bro. C. C. 157, n.; and the note to Raith. edit. of *Vernon*.

(g) *Paine v. Meller*, 6 Ves. jun. 349; and see *Poole v. Shergold*, 2 Bro. C. C. 118; *Revel v. Hussey*, 2 Ball & Beatty, 280; *Harford v. Purrier*, 1 Madd. 532.

(1) Ante, 191, and notes.

(2) See *Combs v. Fisher*, 3 Bibb, 340.

permitted the insurance to expire without giving notice to the vendee: Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his to all intents and purposes (I).

7. This decision proceeded on the only principle upon which it can be supported—that the purchaser was in equity owner of the estate. And therefore, in a case where a similar accident happened to an estate sold before a Master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor (*h*); but in a latter case (*i*), of a purchase before the Master of a life interest, where the report had been confirmed, and the question was from what time the purchaser was entitled to the income, Lord Eldon asked if anything could turn upon the report not being confirmed. There was a case, he said, about a house being burned down before the confirmation of the report. But if the tenant for life had died the same night, must not the purchase-money have been paid? This is a distinction between a destruction of the property by accident before the confirmation of the report and the dropping of a life—an uncertain interest—for which the property was held.

8. The consequence of the rule is, that if after the contract the estate be improved in the interval between the contract and the conveyance, or if the value be lessened by the failure of tenants or otherwise, and no fault on either side, the vendee has the benefit or sustains the loss (*k*).

*9. If a purchaser is guilty of delay, taking frivolous objections to the title, he will not be allowed any benefit accruing in the interval which can be separated from the estate itself.

10. This can hardly be laid down as a general rule, but it seems to be the point decided in *Wyvill v. Bishop of Exeter* (*l*), where a purchaser of an advowson, who had objected to the title for several

(*h*) *Ex parte Minor*, 11 Ves. jun. 559.

Vide p. 71. See *Zagury v. Furnell*, 2 Camp. Ca. 240.

(*i*) *Anson v. Towgood*, 1 Jac. & Walk. 637.

(*k*) See 1 Madd. 539, *post*, ch. 16.

(*l*) 1 Price, 291.

(I) In the 2d vol. of Coll. of Decis. p. 56, are the two following cases:—The peril of a house sold, and thereafter burnt, was found to be the buyer's, though the disposition bore an obligation to put the buyer in possession, because the buyer did voluntarily take possession and rebuild the house, and likewise was enfeoffed before the burning. *Hunter v. Wilsons*.—A house bought being burnt, the Lords found, that the property being transferred to the buyer, by his being enfeoffed, and the keys being offered to him, the accidental loss must follow the buyer, although there was a part of the price unpaid, there being a difference about it, which was referred to some friends to be determined, and which they had not done when the burning happened. *Atchison v. Dickson*.

years without filing a bill, but who was a defendant to a suit by a creditor of the seller, who had died after the contract, was held not to be entitled to a vacancy occasioned by resignation, although he was left at liberty to complete his purchase when the living was full. Macdonald, C. B. said the result of the cases on this point was, that where a purchaser has actually accepted a title after contract for sale, if advantage arise on either side before the execution of the conveyance, as by the lapse of a life in the meantime, a court of equity will enforce a specific performance without regarding which party may be benefitted or prejudiced by the accident of unforeseen events, but where the title has not been accepted, the Court refuses to decree performance. The cases of *Pope v. Root* and *Jackson v. Lever* were material, but in those the titles had been accepted. The distinction between those cases is, that part of the consideration had been paid or tendered in one but not in the other. In *Paine v. Meller*, the decision turned wholly on the question, whether the title had been finally accepted and the previous objection abandoned before the day on which the premises contracted for had been destroyed by fire. If the title had not been acquiesced in, the Court would not have enforced a specific performance, but if it had, they would have decreed the execution of the agreement, notwithstanding certain objections had originally been made to the title.

11. The case may have been properly decided, and certainly the Court would not permit a purchaser to present to a vacancy which could not afterwards be recalled unless he accepted the title, where he had not already done so. But the cases do not authorize the judgment. In *Pope v. Root*, a specific performance was refused, and in *Jackson v. Lever*, the title accepted was to an estate belonging to the *purchaser*, which was to be an additional security to the seller for the annuity. Neither case, however, was decided upon the acceptance of the title, and in *Mortimer v. Capper* there was of course no acceptance of the title. In *Paine v. Meller*, the decree could not have been made unless the title had been accepted *before* the fire, because the seller had not a marketable title, and consequently the contract could not have been enforced *against the purchaser if even there had been no fire, unless he had accepted the title. Lord Rosslyn did not consider it necessary that the title should have been accepted, and he accordingly made a common reference to the Master, to see whether a good title could be made. Lord Eldon reversed that decree, and made a

special reference as to the fact of the acceptance of the title, not because he thought the contract could not be enforced in such a case unless the title had been accepted *before* the accident, but because in that case the purchaser would not have been bound to take the title unless he had thought proper to do so. Lord Eldon placed the doctrine upon the operation of the contract. As to the mere effect of the accident itself, he said, no solid objection could be founded upon that simply, for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes.

12. Lord Eldon's decision in *Paine v. Meller*, exactly accords with the doctrine of the civil law. Indeed this very case is put in the Institutes (*m*). "*Cum autem emptio et venditio contracta sit, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si—aut ædes totæ, vel aliqua ex parte, incendio consumptæ fuerint—emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere.*"

13. It is hardly necessary to remark, that although the Court will enforce a specific performance, notwithstanding that the estate is destroyed, yet this will not be done unless the title be good, or the purchaser has, previously to the accident, waived any objections to it.

14. And if the muniments of title be destroyed by fire after the contract, but before the conveyance, so that there is not sufficient evidence of title left, the purchaser cannot be compelled to complete the purchase, although previously to the fire the abstract had been examined by his solicitor with the deeds (*n*), and in other respects the seller has a good title.

15. The case of *Paine v. Meller* may be considered as having also settled, that a purchaser would be entitled to any benefit accruing to the estate after the agreement, and before the conveyance; for Lord Eldon said, "If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it."

*16. This also appears to have been admitted in a case (*o*) where a man contracted for the purchase of a reversion, and afterwards

(*m*) III. xxiv. 3. Read Puff. *de Jure* purchaser had not accepted the title.
Naturæ et Gentium, 1. 5, c. 5, s. 3. (*o*) *Spurrier v. Hancock*, 4 Ves. jun.
 (*n*) *Bryant v. Busk*, 4 Russ. 1; the 667; and see 1 P. Wms. 62.

the lives dropped before the contract was carried into execution; for, although the Court did not decree a specific performance, they proceeded entirely on the laches and trifling conduct of the purchaser, and never even hinted that the contract should not be performed on account of the lives having dropped; and accordingly it was observed by Sir Thomas Plumer, when V. C., that if a reversionary interest is agreed to be purchased, and lives drop before the conveyance, the vendee has the benefit (*p*).

17. Indeed this point flows from the *decision* in *Paine v. Meller*; and it was the rule of the civil law, that the purchaser should benefit by the accretion to the estate before the conveyance: *nam et commodum ejus esse debet cujus periculum est* (*q*).

18. These cases suggest the observation that, in agreements for the purchase of houses, some provision should be made for their insurance until the completion of the contract.

19. It equally follows, from the general rule of equity, by which that which is agreed to be done is considered as actually performed, that if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the conveyance is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. This, we observe, is a much stronger case than that before discussed. There a loss was actually sustained, and the only question was, upon whom it should fall. But in this case, if performance of the agreement were not compelled, the parties would stand in precisely the same situation as before the contract; whereas, by performing the agreement, the estate is given to the purchaser, without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case, and the doctrine rests upon high authority.

20. Thus in the case of *Mortimer v. Capper* (*r*), *A* contracted to sell an estate to *B* for 200*l.*, and 50*l.* a year annuity; and two days after the contract was reduced into writing, *A* was found drowned: the Lord Chancellor directed an inquiry as to the value of an annuity for the life of *A*, in order to introduce the question, whether an estate being disposed of for an annuity, which is a *contingency, the contract shall fall to the ground, if no payment

(*p*) See 1 Madd. 539.

(*q*) Inst. *ubi sup.*

(*r*) 1 Bro. C. C. 156. See *Wyvill v. Bishop of Exeter*, 1 Price, 292.

of the annuity shall be made. He said, that he thought, if the price were fair, the contract ought not to be cut down, merely because the annuity, which was a contingent payment, never became payable.

The parties in the above cause were so well satisfied with the opinion of the Court, that they never, it is said, brought it back for further directions (s).

21. So in a later case (t), where *A* sold an estate by auction, in consideration of a life annuity (I), the first payment to be made on the 25th of December 1787; but in case he should die before the 29th of September 1787, up to which time he was to receive the rents, the contract should be void. *A* died on the 1st of February 1788, after a sudden and short illness of only two days; and owing to some delays, the conveyances were not executed. The quarter's payment, due at Christmas, was tendered to the vendor's agent by the purchaser, a few days after it became due; but the agent declined receiving it, saying that the conveyance would be soon completed, and that it was not necessary for the purchaser to make such payment in the meantime. On the first hearing, Lord Thurlow said, he did not see that if an annuity was contracted for why the consideration should not be paid. It was, he said, objected, that the contract could not be carried into execution *modo et forma*, and that had great weight where there had been no payment. He afterwards made a decree for a specific performance, on payment of the arrears of the annuity, the consideration for the purchase of the estate.

22. The case of *Paine v. Meller* bears on this point also. Lord Eldon, in delivering judgment, said, that as to the annuity cases, and all others, the true answer had been given; that the party has the thing he bought, *though no payment may have been made*; for he bought subject to contingency; and in the later case of *Coles v. Trecothick*, he expressed the same opinion (u).

23. But if in a case of this nature, a payment of the annuity become due before the death of the vendor, and the purchaser *neglect to make or tender it*, he cannot insist upon a specific performance.

24. This was decided by the case of *Pope v. Root* (x). *A* contracted with *B* for the sale of an estate to him, in consideration

(s) See 3 Bro. C. C. 609, *sed qu.*

(t) *Jackson v. Lever*, 3 Bro. C. C. 605.

(u) See 9 Ves. jun. 246.

(x) 7 Bro. P. C. 184.

(I) See Appendix, No. 10, for a statement of the new Annuity Act.

of a life annuity, and the completion of the agreement was delayed *by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, *A* met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity became due previously to the death of *A*, but it was not paid or tendered. And Lord Chancellor Bathurst dismissed the bill for a specific performance, and the decree was affirmed in the House of Lords (*y*) (I).

25. The reader will observe, that the decisions in the cases of *Mortimer v. Capper* and *Jackson v. Lever*, do not infringe upon that of the House of Lords, in the prior case of *Pope v. Root*, but reduce the rules on this subject to an equitable and uniform standard; for the only case in which a purchaser cannot require the assistance of equity, is where he has by laches forfeited his right to its aid, namely, where a payment of the annuity became due, and he neglected to pay or tender it.

26. To obviate all doubt, it seems advisable in agreements for purchase, where the consideration is an annuity for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered; but that, on the contrary, the purchaser shall be entitled to a conveyance, on payment of a proportionate part of the annuity up to the death of the vendor.

27. In the cases just dismissed, the *purchaser*, by the death of the vendor, obtained the estate without paying any, or only a nominal consideration for it. Perhaps a case may arise where the vendor having received the purchase-money, may, by the death of the purchaser, be entitled to retain the estate also, although he may not be his heir. This case was put in the argument of *Burgess v. Wheate* (*z*): a purchase, and the money paid by the purchaser, who dies without heir, before any conveyance. It was said, if the lord could not claim the estate, and pray a conveyance,

(*y*) See Lord Bathurst's decision in (*z*) 1 Blackst. 123; see 4 & 5 Will. 4, *Baldwin v. Boulter*, 1 Bro. C. C. 156, c. 23. cited.

(I) It seems to have been thought, that the inadequacy of the consideration influenced this decision; see 2 Pow. on Contracts, 76; but it does not appear that any inadequacy was actually proved.

the vendor would hold the estate he has been paid for, and keep the money too. Sir Thomas Clarke, in delivering his opinion, said, that he thought the lord could not pray the conveyance; to *say he could was begging the question. And as to the vendor's keeping both the estate and the money, it was analogous to what equity does in another case; as where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee. So where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor, for the personal representatives of the purchaser; which would leave things in *statu quo*.

28. It may be doubted, however, whether this case, if it should ever arise, would be decided according to Sir Thomas Clarke's opinion. Where a lien is raised for purchase-money under the usual equity (a), in favor of a vendor, it is for a debt really due to him, and equity merely provides a security for it. But in the case under consideration, equity must not simply give a security for an existing debt; it must first *raise* a debt against the express agreement of the parties. The purchase-money was a debt due to the vendor, which upon principle it would be impossible to make him repay. What power has a court of equity to *rescind* a legal contract like this? The question might perhaps arise if the vendor was *seeking* relief in equity, but in this case he must be a defendant. If it should be admitted that the money cannot be recovered, then of course he must retain the estate also, until some person appear who is by law entitled to require a conveyance of it.

29. It has been decided that a specific performance will be decreed of a contract for sale of a life annuity, although the annuitant be dead before the bill be filed, provided the contract was a continuing one at his death (b). This is the converse of the point decided in *Mortimer v. Capper*, and that line of cases. The Vice-Chancellor (Sir John Leach) observed, that it may now be considered as the settled law of the court, by the cases of *Mortimer v. Capper*, and *Jackson v. Lever*, and the reported *dicta* of Lord Eldon, especially in the case of *Coles v. Trecothick*, that if the price of property be an annuity for the life of the vendor, his death before the conveyance will form no objection to the specific performance of the contract. The vendor agrees to sell for a contingent price, and those who represent him cannot complain that

(a) Vide *infra*, ch. 18.

(b) *Kennedy v. Wenham*, 6 Madd. 355; see *Wilkinson v. Torkington*, 2 You. & Coll. 726.

the contingency has turned out unfavorably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance *of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavorable to him.

30. In the above case, the purchaser was entitled to arrears of the annuity, but the annuity was charged on the purchaser's own estate. It was argued that by the death of the annuitant, a legal transfer of the annuity was no longer necessary to the purchaser, and the only act to be done was the payment of a sum of money by him to the seller, and that the seller ought therefore to have proceeded at law and not in equity. The Vice-Chancellor said, that a court of equity entertains a suit for specific performance by a purchaser, in order to give him the very subject of his contract; and although the demand of a vendor be merely for a sum of money, it will entertain a similar suit for him, upon the principle that the remedies ought to be mutual. If the death of a life-annuitant were to happen at such a time that a purchaser in effect took no benefit under his contract, which might well happen where his title was to commence at a future time, there it might be made a question whether, as at the time of the bill filed a purchaser could file no bill in equity, the principle of mutual remedy could enable the vendor to file such a bill. But that was not the case there; the purchaser had an equitable title to the arrears of the annuity between the time of his purchase and the death of the annuitant, which would in principle support a bill on his part for specific performance, although the facts of the case would not make such a bill advantageous to him. He considered this case, therefore, strictly a case of mutual remedy, so as to entitle the vendor to file a bill for specific performance; and it appeared to him to make no difference in principle that the annuity being charged upon the estate of the purchaser himself, he could practically satisfy his demand for arrears, by retainer, without the necessity of a legal grant.

31. Here we may refer to a case, where by the agreement the seller was to become tenant of the estate from year to year, and he became incapable by reason of his bankruptcy of performing that stipulation, and yet a specific performance was enforced

against the purchaser because the tenancy was from year to year, which made it of no consideration (*c*). But the same rule ought to prevail whatever be the length of the term agreed upon. It is a consideration moving from the seller to the purchaser, to the benefit of which the latter is entitled.

(*c*) Lord *v.* Stephens, 1 You. & Coll. 222.

*CHAPTER VII.

OF THE PARTIAL EXECUTION OF A CONTRACT, WHERE A VENDOR HAS NOT THE INTEREST WHICH HE PRETENDED TO SELL; AND OF DEFECTS IN THE QUANTITY AND QUALITY OF THE ESTATE.

SECTION I.

WHERE THE VENDOR HAS NOT THE INTEREST WHICH HE SOLD.

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| 1. <i>Sale of lease for more years than seller has.</i> | 34. <i>Dale v. Lister.</i> |
| 3. <i>Power of redemption not stated.</i> | 35. <i>Milligan v. Cooke.</i> |
| 5. <i>Small deficiency of term : sale good in equity.</i> | 36. <i>Indemnity not compelled.</i> |
| 10. <i>Underlease sold as original lease.</i> | 38. <i>Contract upon mistake of interests.</i> |
| 11. <i>Whether purchaser of old lease bound to take a new one.</i> | 39. <i>Lawrenson v. Butler.</i> |
| 12. <i>Or a seller to underlease who sold the whole lease.</i> | 41. <i>Sale by tenant for life, &c. not partially enforced against purchaser.</i> |
| 14. <i>Rent and interest on sale of leaseholds.</i> | 43. <i>Lord Eldon's opinion of purchaser's right against seller.</i> |
| 17. <i>Purchaser of freehold not bound to take leasehold.</i> | 44. <i>Thomas v. Dering, right denied.</i> |
| 19. <i>Nor copyhold.</i> | 45. <i>Observations on it.</i> |
| 22. <i>Acquiescence by purchaser.</i> | 46. <i>Effect of expenditure by purchaser.</i> |
| 26. <i>Purchaser not bound to take less than the entirety.</i> | 47. <i>Misrepresentation by purchaser.</i> |
| 27. <i>Of two-sevenths not bound to take one-seventh.</i> | 48. <i>Void lease.</i> |
| 28. <i>But may elect to do so.</i> | 49. <i>Rights incapable of compensation.</i> |
| 29. <i>Unless condition to the contrary.</i> | 50. <i>Acquiescence by purchaser.</i> |
| 31. <i>Reversionary interests not forced upon purchaser of possession.</i> | 51. <i>Right of common not disclosed.</i> |
| 32. <i>Purchaser's right against the seller.</i> | 52. <i>Limited right and unlimited sold.</i> |
| | 53. <i>Sheep-walk represented as freehold.</i> |
| | 54. <i>Right to dig mines.</i> |
| | 55. <i>Charge of repairs of chancel.</i> |
| | 56. <i>Fee-farm rent : at law.</i> |
| | 57. <i>Quit-rent : in equity.</i> |
| | 58. <i>Rent charge : in equity.</i> |
| | 63. <i>Quit-rents less than stated.</i> |

1. A GENERAL agreement to sell a property means a sale in fee simple, and the Court will not infer that a term of years only is sold on account of the smallness of the price (a). Where a person sells an interest, and it appears that the interest which he

(a) *Hughes v. Parker*, 8 Mees. & Wels. 244.

pretended to sell was not the true one; as, for example, it was for *a less number of years than he had contracted to sell, the purchaser may consider the contract at an end, and bring an action for money had and received, to recover any sum of money which he may have paid in part performance of the agreement for the sale (1): and the vendor offering to make an allowance *pro tanto*, will make no difference; it is sufficient for the plaintiff to say, it is not the interest which I agreed to purchase (b).

2. But in a late case (c) at *nisi prius*, where the agreement was to sell "the unexpired term of eight years' lease and good will," &c. and it appeared that, at the date of the agreement, the unexpired term in the lease was only seven years and seven months, Lord Ellenborough said, that the parties could not be supposed to have meant that there was the exact term of eight years unexpired, neither more nor less by a single day. The agreement must, therefore, receive a reasonable construction, and it seemed not unreasonable that the period mentioned in the agreement should be calculated from the last preceding day when the rent was payable, and including, therefore, the current half year. Any fraud or material misdescription, though unintentional, would vacate the agreement, but the defendant might here have had substantially what he agreed to purchase.

3. Where a particular described the subject of sale to be an annuity of so much, payable out of the tolls of Waterloo Bridge, the Court considered that the purchaser would make some inquiry as to the annuity: but as the Bridge Act did not speak of any power to redeem the annuities to be granted, and the annuity was made subject to redemption, it was held that the contract was not binding on the purchaser; and the Court was of opinion, that sellers should be strictly bound to disclose the real nature of the subject of the contract (d).

4. But, notwithstanding that vendor has a different interest to what he pretended to sell, equity will, in some cases, compel the purchaser to take it.

(b) *Farrer v. Nightingale*, 2 Esp. Ca. 639; and see *Hearn v. Tomlin*, Peake's Ca. 192; *Thomson v. Miles*, 1 Esp. Ca. 184; *Mattock v. Hunt*, B. R. 15 Feb. 1806; *Hibbert v. Shee*, 1 Camp. Ca. 113. See also *Duffell v. Wilson*, *ib.* 401; and see *infra*.
(c) *Belworth v. Hassell*, 4 Camp. Ca. 140.
(d) *Coverley v. Burrell*, M. T. 1821. B. R. MS.

(1) See *Gillett v. Maynard*, 5 John. 85; *Lyon v. Annable*, 4 Conn. 350; *Putnam v. Westcot*, 19 John. 73.

5. Thus, although the vendor may not be entitled to the estate for the number of years which he contracted to sell, yet, if the deficiency were not great, equity would certainly decree a performance of the contract at a proportionable price (*e*) (1).

*6. Lord Thurlow used to refer this doctrine of specific performance to this, that it is scarcely possible that there may not be some small mistake or inaccuracy, as that a leasehold interest represented to be for 21 years, may be for 20 years and nine months; some of those little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution in a court of equity (*f*) (2).

7. But if the number of years be considerably less than the vendor pretended to sell, equity, so far from interfering in his favor, will assist the purchaser in recovering any deposit which he may have paid.

8. Thus, in *Long v. Fletcher* (*g*), *A* pretending he had a term of sixteen years to come, in a house, agreed to sell it to *B*, and *B* paid 100*l.*, part of the consideration money, down. *B* entered, but finding that *A* had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside; and accordingly *B* was decreed to account for the profits, and the consideration money to be refunded, and *B*, upon his own account, to have tenant allowances made him.

9. So the purchaser will not be bound, as we have seen, where the probable duration of the interest is *misrepresented*, although it be in its nature an uncertain one; as where the property being held for life, the life was represented as a very healthy one, although the sellers had recently insured it at a premium exceeding the highest rate for a healthy life of that age: the seller's bill was dismissed with costs (*h*).

10. So, if a purchaser contract for what is stated to be an

(*e*) See *Guest v. Homfray*, 5 Ves. jun. 818; and see *Hanger v. Eyles*, 21 Vin. Abr. (A.) pl. 1; 2 Eq. Ca. Abr. 689; see also 10 Ves. jun. 306; 13 Ves. jun. 77.

(*f*) *Per* Lord Eldon, 10 Ves. jun. 305, 306.

(*g*) 2 Eq. Ca. Abr. 5. pl. 4.

(*h*) *Brealey v. Collins*, You. 317; *Turner v. Harvey*, Jac. 169, *supra*, p. 312.

(1) See Fonbl. Eq. B. 1, Ch. 6, §2 note (*e*); Ch. 3, §9, note (*i*); Ch. 2, §7, note (*v*.); *Reynolds v. Vance*, 4 Bibb, 215; *Hepburn v. Auld*, 5 Cranch, 278; 2 Story Eq. Jur. §777; *King v. Bardeau*, 6 John. Ch. 38; *Chinn v. Heale*, 1 Munf. 63; *Buck v. McCaughtry*, 5 Monroe, 230; 2 Kent (6th ed.) 475; *Soule v. Heerman*, 5 Miller (Louis.) 358.

(2) *Craven v. Tickell*, 1 Sumner's Vesey, 60 in note (*a*); *Calverley v. Williams*, ib. 210, in note (*a*); 1 Story Eq. Jur. §141; 2 ib. §777; *Weems v. Brewer*, 2 Harr. & Gill, 390; *Evans v. Kingsbury*, 2 Randolph, 120.

original lease, and it turn out to be an underlease for the whole term, wanting a few days, it should seem that equity would not compel the purchaser to perform the contract. It is impossible, from the nature of the thing, to make any compensation for the reversion outstanding, and yet it may become very valuable; and it is of great importance to a purchaser of a lease not to have any third person stand between him and the owner of the inheritance.

11. So, it is said, that a purchaser of an existing lease is not bound to take a new lease instead of the old one, because the purchaser would become an original lessee instead of an assignee, and might therefore be subject to burdens to which he would not have been liable in the latter character (*i*).

12. Generally speaking, where the seller has not the whole interest *which he sold, the *purchaser* may elect to take the interest which the seller has with a compensation (1); yet it seems that equity will not decree an under-lease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the seller, in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the under-lease (*j*). This is, however, a defence which a vendor can seldom set up against a purchaser's claim, where the purchaser chooses to accept an under-lease; for an assignee of a lease almost invariably covenants to indemnify his vendor from the rent and covenants in the lease, and from these covenants he cannot of course discharge himself by an assignment, any more than by an under-lease.

13. It frequently happens that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price originally agreed to be given for the estate, or what arrangement shall be made between the parties.

14. In a case where two years of the lease, which was only for seven, had elapsed, the Court said they could only decree specific performance of the same contract, not of a different one. They could not make a new contract for a different sum, by apportioning

(*i*) *Mason v. Corder*, 2 Marsh. 332. to 1 Trea. Eq. 211, 2d edit. See *Mason*
 (*j*) *Anon. E. T. 1790*; *Fonbl. n. (r)*, *v. Corder*, 2 Marsh. 332.

(1) See Post, 359.

the price according to the time which had yet to run (*k*). It does not appear who was in possession. But in a modern case (*l*), where this point arose, the Master of the Rolls said, the reasonable course which he should adopt was, that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser, and a rent should be set upon the premises in respect of the possession of the vendor.

This rule at once provides for the interest of both parties, and accords with the maxim of equity, by which that which is agreed to be done, is considered as actually performed. The purchase-money, from the time of the contract, belongs to the vendor, who is entitled to interest on it while it is retained by the purchaser. The estate from the same time belongs to the purchaser, who is entitled to a rent for it while it is occupied by the vendor (*l*)

*15. In the cases hitherto considered, the tenure was still that sold, viz. leasehold, although for a less term, or held differently from the interest pretended to be sold.

16. But a purchaser having bought an estate of one tenure, is not bound to accept it if it prove to be of another.

17. Therefore a purchaser will not be compelled to take a leasehold estate, for however long a term it may be holden, where he has contracted for a freehold (*i*). Lord Alvanley expressed a clear opinion upon this point (*m*), and it was afterwards expressly determined by Sir Wm. Grant in a case (*n*) where the vendor was entitled to a term of 4,000 years vested in a trustee for him, and also to a mortgage of the reversion in fee expectant upon the term which was vested in himself and forfeited, but not foreclosed. The persons claiming under the mortgagor of the reversion refused to release, and thereupon the bill was dismissed.

18. So where the seller agreed to sell the fee simple of an estate

(*k*) *King v. Wightman*, 1 Anstr. 80; there had been a decree by consent which the Court could not rehear; *Fenton v. Browne*, 14 Ves. jun. 144; see the prayer of the cross bill.

(*l*) *Dyer v. Hargrave*, 10 Ves. jun. 505.

(*m*) See 2 Bro. C. C. 497; 1 Ves. jun.

226.

(*n*) *Drewe v. Corp.*, 9 Ves. jun. 368. Lib. Reg. 1803, fol. 290. The Registrar's book appears to have been again referred to for this case, 1 Sim. & Stu. 201, n.; and see 13 Ves. jun. 78; *Barton v. Lord Downes*, 1 Flan. & Kel. 505.

(*i*) As to making a title formerly by feoffment and assigning the term to a trustee, see *Saunders v. Lord Annesley*, 2 Scho. & Lef. 73; *Doe v. Iynes*, 3 Barn. & Cress. 388; 5 Dowl. & Ryl. 160; *Doe v. Pitt*, 11 Adol. & Ell. 842; and now a feoffment has no tortious operation, 7 & 8 Vict. c. 76, s. 7; 8 & 9 Vict. c. 106, s. 4.

(1) See ante, 191.

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with some rights of water, and he had only a lease for 99 years of some of the rights, a specific performance against the purchaser was refused (*o*).

19. Neither is a purchaser compellable to accept a copyhold estate in lieu of a freehold (*p*) (*I*).

20. But if an estate is sold as copyhold, and represented as equal in value to freehold, it seems that the vendor will be compelled to perform the contract, although the estate prove to be actually freehold (*q*). If, however, the contract for the sale of a supposed copyhold, stipulate that the sale shall be void if any part is freehold, the subject must be proved as described; and the circumstance *of the seller himself, after the first contract, selling the estate to another as copyhold, is not conclusive evidence against him (*r*).

21. There is a singular case in the books (*s*), where, amongst other townlands, the lands of Ballyknockan, containing 700 acres, were put up to sale as land subject to a fee-farm grant of 100*l.* per annum, whereas the seller's title was to a fee-farm rent of that amount issuing out of those lands, and it was contended that the sale being of land subject to a fee-farm grant, it was to be considered as a rentcharge, chargeable on the other lands sold, and that the purchaser ought to be compelled to accept compensation. The argument proves how impossible it was to maintain the claim. For the purchaser bought the lands subject to a rentcharge, and the seller had not got them, but had a rentcharge issuing out of them. There was therefore no charge to throw upon the other lands; but the question simply was, whether a man having purchased a fee simple estate, subject to a perpetual rentcharge, could be compelled to take the perpetual rentcharge instead of the estate itself; and of course it was held that he could not. The lands were adjoining to other property belonging to the purchaser, and

(*o*) *Wright v. Howard*, 1 Sim. & Stu. 326; and see *Browne v. Fenton*, *sup.* p. 190.

(*p*) See *Twining v. Morrice*, 2 Bro. C. C. 249. (*r*) *Daniels v. Davison*, 16 Ves. jun. C. 326; and *Sir Harry Hick v. Philips*, 249.

Prece. Cha. 575. (*s*) *Prendergast v. Eyre*, 2 Hogan, 81.

(*q*) *Twining v. Morrice*, 2 Bro. C. C.

(*I*) In the case of *Sir Harry Hick v. Philips*, on account of the unreasonable price at which the estate was sold, a specific performance was refused, although the vendor offered to procure an enfranchisement of the copyholds. See 10 Mod. 504. But this case cannot be considered as an authority, except on the ground of the price being unreasonable, for equity will in ordinary cases grant the vendor time to procure the fee. See *supra*, ch. 5.

he desired to possess them, but without that circumstance he had a clear right to rescind the sale.

22. If a vendee proceed in the treaty for purchase after he is acquainted with the nature of the tenure, and do not object to it, he will be bound to complete his contract, and cannot claim any compensation on account of the difference in value (1).

23. Thus, where an estate was sold as freehold, with a leasehold adjoining (t), and it turned out on examination that sixty-two acres were leasehold, and only eight freehold; yet, as the purchaser proceeded in the treaty after he was in possession of this fact, and did not object to the nature of the property, he was held to have waived the objection.

24. And if a purchaser do object to the tenure, yet, if he proceed in the treaty, it seems that he will be compelled to take the estate, on being allowed a compensation (u).

25. In the case of *Wirdman v. Kent* (v), upon a bill filed by vendors for a specific performance, it appeared that part of the lands sold to the purchaser had been previously sold to one Pavey; a specific performance was however decreed, and, as to the lands *terriered to the defendant, but which had been sold to Pavey, it was ordered that the plaintiffs should procure Pavey to release them to the defendant, *or convey a like quantity of land of equal value to the defendant.*

The particular circumstances of this case do not appear in the report; but it must be presumed, that the land sold to Pavey was not the object of the purchaser; and that other land in the neighborhood, of equal value, would suit him as well. Indeed, in one report of this case (x), it is said that the grievances complained of were disregarded as frivolous.

26. Although there be no misrepresentation as to the tenure of the estate, yet if the seller has not the entirety of the estate sold, he cannot compel the purchaser to accept at a proportionate price the shares which he actually has in the estate. And the rule is the same if the entirety is sold by several who are entitled to it amongst them in aliquot shares. Therefore if a man contract with tenants in common for the purchase of their estate, and one of them die,

(t) *Fordyce v. Ford*, 4 Bro. C. C. 494;
and see 6 Ves. jun. 670; 10 Ves. jun.
508; *Burnell v. Brown*, 1 Jac. & Walk.
168.

(u) See *Calcraft v. Roebuck*, 1 Ves.
jun. 221.

(v) 1 Bro. C. C. 140.

(x) 2 Dick. 594.

(1) *Craddock v. Shirley*, 3 A. K. Marsh. 288.

the survivors cannot compel the purchaser to take their shares, unless he can obtain the share of the deceased (*y*).

27. And in a case where under a decree a person purchased two-sevenths of an estate in one lot, and a good title was made to one seventh only, the purchaser was allowed to rescind the contract as to the whole of the lot (*z*).

28. But the converse of this proposition does not hold good, for the purchaser may compel the survivors in the case before put to convey their shares to him, although the contract cannot be executed against the heir of the deceased (*a*), for a purchaser generally, although not universally, may take what he can get, with compensation for what he cannot have (*b*).

29. But where an agreement stipulated that errors in the description should not vacate the agreement, but a reasonable abatement or equivalent should be made or given, as the case might require; with a further stipulation that if the purchaser's counsel should be of opinion that a marketable title could not be made, the agreement should be void and delivered up to be cancelled; and it appeared by such counsel's opinion that a title could be made to only two thirds of the property; notwithstanding which the purchaser filed a bill for a specific performance with an abatement, his bill was dismissed with costs. The Court thought that as the above-mentioned stipulation was the contract of both parties, it could not make a *new contract for them. They had stipulated, that in a given event, which had happened, the agreement should be void (*c*). The condition however hardly seemed to apply to the want of title to one-third of the property.

30. Cases, however, of much greater difficulty occur where the question turns not upon the length of the term or the nature of the tenure, or the want of title to the entirety, but where the seller, although he is interested as he represented in the entirety, yet has but partial and different interests from those which he represented. In general a purchaser cannot be compelled to accept such interests.

31. Thus, if the estate be represented as a fee-simple in possession, and it turn out to be only a remainder expectant upon a life interest, however advanced in life the tenant for life may be, the contract

(*y*) *Attorney-general v. Gower*, 1 Ves. 218.

(*z*) *Roffey v. Shallcross*, 4 Madd. 227; *Dalby v. Pullen*, 3 Sim. 29; *Casamajor v. Strode*, 2 Myl. & Kee. 726.

(*a*) *Attorney-gen. v. Gower*, 1 Ves. 218.

(*b*) *Per Lord Eldon*, 1 Ves. & Bea. 353.

(*c*) *Williams v. Edwards*, 2 Sim. 78.

cannot be enforced against the purchaser (*d*). And, indeed, the same observation would apply to any existing lease where the purchaser has contracted for a vacant possession.

32. But we may observe, that in every case where an agreement would be in part executed in favor of a vendor, there is much greater reason to afford the aid of the Court at the suit of the purchaser, if he be desirous of taking the part or interest to which a title can be made. And a purchaser may, in some cases, insist upon having the part of or interest in an estate to which a title is produced, although the vendor could not compel him to purchase it; it is true, generally, *but not universally*, that a purchaser may take what he can get, with compensation for what he cannot have (*e*).

33. If, Lord Eldon observed, a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of the contract. For the person contracting under these circumstances is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement (*f*)(1). Upon another occasion (*g*) Lord Eldon said, that no one could dispute the proposition, that if a man agrees to sell me an estate in fee simple, and cannot make a title to the fee simple, I can insist upon his giving me all the title he has: he cannot *say he will give me nothing, because he cannot give me all I have contracted for. If he contracts to sell a fee simple, and has only a term of 100 years, I have a right to that term if I think fit (2).

34. Therefore in a case where the estate was sold for twenty-one years, and represented as held under a church-lease, usually renewed every seven years, and it appeared that the seller was only entitled for lives to part; the *purchaser* filed a bill for a specific performance, with a reduction. The seller insisted that the purchaser might

(*d*) *Collier v. Jenkins*, You. 295.

(*e*) See 1 Ves. & Beam. 353; *Western v. Russell*, 3 Ves. & Beam. 187; *Wheatley v. Slade*, 4 Sim. 126.

(*f*) *Per* Lord Eldon, 10 Ves. jun. 315, 316, 318. The same doctrine was laid

down by his Lordship in *Wood v. Griffith*, 12 Feb. 1818; and see 2 Ves. jun. 439, *acc. per* Lord Rosslyn.

(*g*) *Wood v. Griffith*, 1 Wils. Cha. Ca. 44; S. C. MS.

(1) See *McKay v. Carrington*, 1 M'Lean, 64.

(2) *Waters v. Travis*, 9 John. 450, 461, 165; *Voorhees v. De Meyer*, 2 Barbour Sup. Ct. 37; *Hepburn v. Auld*, 5 Cranch, 262; *Chinn v. Heale*, 1 Munf. 63; *Westervelt v. Matheson*, 1 Hoff. Ch. Rep. 37; *Morss v. Elmendorf* 11 Paige, 277; *Jones v. Shackelford*, 2 Bibb, 411; *Fisher v. Kay*, ib. 434; *Step v. Alkire*, 2 A. K. Marsh. 259; *Rankin v. Maxwell*, ib. 494.

have an option to put an end to the contract, but that he (the seller) ought not to be compelled to take less than the stipulated price. The decree, however, was for a specific performance, with a reduction of the purchase-money, the interest of the seller being less valuable than it had been represented to the purchaser (*h*). Lord Eldon has since observed, that the consequence of this decision was, that if the lives should endure beyond the period of twenty-one years, the purchaser would have the premises as well as the compensation. In that respect the case was new, and deserved great consideration. He added, that in a conversation which he had with the Master of the Rolls, they inclined to think it might be right upon this reasoning, that the estate was purchased subject to a contingency affecting its immediate value; he could not carry it to market, he could do nothing with it that would make it absolute property in him as if he had an absolute term of twenty-one years; but as the compensation might be aggravated enormously, beyond the actual value, so it might be much too small, and the Court would throw the chances together. The only other course was to adopt the principle of indemnity, either by taking security, or laying hold of part of the purchase-money, with a view to compensation if the case should arise, and that was open to this difficulty, that the property held subject to the question of indemnity remains unsaleable, unmarketable, and of infinitely less value than it would otherwise be.

35. In a later case (*i*), upon a sale of leasehold for lives, the representation of the seller was held to amount to this: that the lessee thereof upon lives, under a church lease, granted the lease in question, with covenants, binding his real and personal representatives to procure renewals to make the complete term sold. It appeared, however, that the covenant to renew was limited, and not binding to the extent mentioned, the estate being in settlement, and the covenants not general. The *purchaser* filed a bill for a specific *performance, with an allowance. In effect the difference was between a covenant by the lessor binding all his assets real and personal, and a covenant which only bound that property which the lessor might permit to go from him to his son, who would be entitled to the property under the settlement. Lord Eldon felt great doubt whether that could be made the subject of a valuation. The purchaser, however, only desired an indemnity upon a real

(*h*) *Dale v. Lister*, 16 Ves. jun. 7, cited; *Hanbury v. Litchfield*, 2 Myl. & Kee. 629; a singular case.

(*i*) *Milligan v. Cooke*, 16 Ves. jun. 1.

estate; so by part of the purchase-money to be kept in Court, the sellers receiving the dividends. The Lord Chancellor decreed a specific performance, and directed an inquiry what was the difference between the value of the interest actually sold, and that represented, and such difference to be deducted from the purchase-money; and if the Master should find that he was unable to ascertain such difference in value, or if the purchaser should choose to take the title with a sufficient indemnity, he might, and the decree was affirmed upon a rehearing. He said, that if it could be the subject of immediate compensation it ought; if not, the purchaser would be entitled to all that he could have, certainly, with a deduction in respect of what he could not have, throwing back the benefit of the covenants to the vendor; or he might have the benefit of the covenants, and an indemnity against those who could claim under the settlement against his engagement.

36. But Lord Eldon himself, in another case, laid it down generally, that the Court can neither compel a purchaser to take an indemnity nor a vendor to give it (*k*); and it seems to be difficult to maintain that an indemnity ought to have been enforced in either of the cases above quoted.

37. And where, by an agreement, the title was to be made out to the satisfaction of a person named, upon a general reference to arbitration, which was to settle all questions between the parties, and the arbitrator awarded the seller to convey to the purchaser the title contained in the abstracts, and the seller to execute a bond of indemnity to the purchaser, to secure him against eviction by reason of any defect in the title, the award was set aside as not being final, and being an excess of authority (*l*).

38. It has been determined by Lord Redesdale, that where at the time of the contract, the purchaser is fully aware that the vendor cannot execute the agreement, and, consequently, cannot enforce the performance of it; there the agreement must be presumed to have been executed under a mistake, and the purchaser *cannot insist upon a performance as to the interest to which the vendor may be actually entitled (*m*).

39. And in a case where a tenant for life, with a power of leasing for twenty-one years at a rack-rent, agreed to execute a

(*k*) *Balmanno v. Lumley*, 1 Ves. & Beam. 225; *Paton v. Brebner*, 1 Bligh, 66; *infra*, ch. 10.

(*l*) *Ross v. Boards*, 3 Nev. & Per. 382.

(*m*) *Lawrence v. Butler*, 1 Scho. & Lef. 13; see *Mortlock v. Buller*, 19 Ves. jun. 292; *Colyer v. Clay*, 7 Beav. 189.

lease for twenty-one years, and a further lease for twenty-one years at any time during his life, consequently to execute a lease for twenty-one years, whatever might be the increased value of the property at the time the lease should be granted; Lord Redesdale considered it a contract to act in fraud of the power, and that the lessee was not entitled to a specific performance. To obviate this objection, the lessee offered to take a renewed lease for twenty-one years, if the lessor should so long live; but Lord Redesdale thought that this was one of those cases where the plaintiff had no right thus to qualify the contract he insisted upon: there was nothing in the case to show that satisfaction in the form of damages was not an adequate remedy for him. If he had been put into a situation from which he could not extricate himself, the defendant might be called on to make the best title in his power; but nothing could be more mischievous than to permit a person who knows that another has only a limited power, to enter into a contract with that other person, which, if executed, would be a fraud on the power, and when that was objected to, to say, "I will take the best you can give me." A court of equity ought to say, to persons coming before it in such a way, "make the best of your case with a jury (n) (1)."

40. It should be observed that there was another point in the above cause, and the decree was pronounced after considerable doubts. It seems difficult to reconcile the opinion expressed by Lord Redesdale with the current of authorities. It was not a necessary consequence of the contract that the lease agreed to be granted would be a fraud on the power, and the purchaser was willing to take the interest which the seller was enabled to grant without risk to himself or injury to the remainder-men.

41. Where an estate is in strict settlement, a tenant for life, with, for example, an ultimate remainder in fee, selling, as the owner of the fee, to a person ignorant of the state of the title, of course could not compel the purchaser to take his partial interest with a compensation.

42. And we have seen that if such a person contract to sell, not as owner, but merely as agent for the trustees, and the contract could not have been enforced against the trustees, it cannot be *carried into execution against the tenant for life, although by the

(n) *Harnet v. Yielding*, 2 Scho. & Lef. 549; vide *infra*, ch. 8.

(1) See *Graham v. Hendren*, 5 Munf. 183.

happening of events he himself has become entitled to the fee in possession (o).

43. But the rule laid down by Lord Eldon, which has already been referred to, was intended to express his opinion, that where in such a case the tenant for life was the party really contracting, he was bound, at the election of the purchaser, to convey to him all the interest he had in the estate at a proportionate price.

44. This, however, was ruled otherwise in a late case at the Rolls (p), where the tenant for life, under a settlement, with full knowledge of the nature of his title, entered into a contract for sale of the estate as owner by letters to a purchaser who was ignorant of the title, and then desired to withdraw from the contract, and the trustees, in whom a power of sale was vested, refused to adopt the contract; the purchaser required the seller to convey to him his estate for life, which was without impeachment of waste, and his reversion in fee after an estate tail in his son, but this was refused. The Court observed, that without derogation in any respect from the jurisdiction, it was apparent that the Court would not in every case compel a vendor to convey such estate as he could. And upon the general principle that the Court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the Court, before directing the partial execution of the contract, by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding might affect the interests of those who were entitled to the estate, subject to the limited interest of the vendor. The vendor had a life estate without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement, and the protection intended to be afforded to the objects of it (I), —conceiving that the consequence of a partial execution of this contract might be prejudicial to those objects, seeing the difficulty of ascertaining, upon satisfactory grounds, the just amount of abatement from the purchase-money, — (for it was more easy to compute a just compensation where it is to be given for the defect in the quantity or the quality of the land sold, than where it is to be given for the deficiency of the vendor's interest) —and considering also that nothing had been done upon the contract, so that the purchaser, though suffering

(o) *Mortlock v. Buller*, 10 Ves. jun. 292; vide *supra*, p. 241, pl. 48.

(p) *Thomas v. Dering*, 1 Keç. 729. See *Graham v. Oliver*, 3 Beav. 124.

(I) See the substitution for recoveries act, *post*, ch. 11, s. 4.

the disappointment of not making himself the owner of an estate *he desired to possess, had sustained no damage for which compensation might not be given by a jury, it appeared to the Court that a conveyance of the vendor's life estate and ultimate reversion to the purchaser ought not to be decreed.

45. There is no doubt great difficulty in these cases ; but in the case just referred to, no circumstance existed on the part of the purchaser upon which relief could be refused to him against the seller. It was not denied that the seller was bound by the contract, and he took advantage of the state of the title to avoid the specific performance of a contract which he had entered into with full knowledge that he could not bind the whole fee, although the purchaser was not aware of the circumstance, and the seller even concealed for a time the objection made by the trustee to adopt the sale. Nor if the seller, according to the general rule, was bound to convey what interests he could at a proportionate price, did the difficulty of valuing those interests afford any solid objection to the relief. The estate for life was without impeachment of waste, and the purchaser, no doubt, might sell the timber, but the Court ought not, it is conceived, in such a case to look at the interests of the tenant in tail, nor indeed could it protect them; for the tenant for life might fell the timber, or sell his life estate, with the right to cut it the next hour, and equity could not refuse to perform such a contract, however injurious it might prove to the tenant in tail. Indeed, in this case the timber was not of large value, and the tenant for life, pending the suit, employed workmen to cut it, although of course he was stopped by injunction upon the purchaser's application. If a tenant for life *bona fide* apprehending that the trustees of the settlement will adopt his contract, sell, meaning only to concur in a sale of the fee, that might be a good defence in equity against a partial execution of the contract by the tenant for life alone. But such sales, where the settlement is concealed, deserve no favor, for there is no mutuality ; the trustees, by their election, may force the purchaser to complete, although he cannot compel them to join, and they are too frequently mere instruments in the hands of the tenant for life, who procures them to concur in the sale or reject it, just as best suits his own views.

46. If in a case of this nature, the purchaser, on the faith of the agreement, put himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his

agreement, that is a circumstance to induce a court of equity to give relief. Thus, in a case before Lord Thurlow, the incumbent of a living had, with full knowledge of the title, contracted with the tenant in tail, in remainder after a life estate, for the purchase *of the advowson, and on the faith of that agreement had built a much better house than he would otherwise have done; the tenant for life would not join in suffering a recovery, and consequently a good title could not be made. Lord Thurlow held, that as the purchaser had, upon the faith of the contract, built a good house on the glebe, he ought to have the utmost the vendor could give him; and therefore directed the vendor to convey a base fee, by levying a fine with a covenant to suffer a recovery whenever he should be enabled to do so by the death of the tenant for life (*q*).

47. But if there have been misrepresentation on the part of the purchaser, he cannot insist upon having the estate, although he is willing to take subject to the outstanding interests. This is the case of *Clermont v. Tasburgh* (*r*). Upon a treaty for an exchange, Clermont informed Tasburgh that the tenants of the latter were agreeable to the exchange, and thereupon the agreement was made, which stipulated for possession on both sides. It appeared upon a bill filed by Clermont that the tenants had not consented. The bill sought that Tasburgh should buy out his tenants, or that the value should be proportionably reduced. The opinion of the Court being against the plaintiff, he offered to waive the part of the contract which stipulated for possession, and not to require the tenants to be bought out. But this was denied to him, because, as the contract was obtained by misrepresentation, it was void both at law and in equity. When an agreement is obtained by fraud, the effect is not to cut it down or modify it only, but it vitiates it *in toto*, and the party who has been drawn in is totally absolved from obligation.

48. If the vendor has granted a lease of the estate, which is void by force of a statute, the Court will not on the request of the purchaser consider the lease as valid, and allow him a compensation in respect of it (*s*).

49. There are some rights which, although in themselves of small value, are incapable of compensation, and therefore, if undisclosed, vitiate the contract; for example, a right of sporting reserved over the estate, for it would not be possible to estimate

(*q*) Lord Bolingbroke's case, cited 1 Scho. & Lef. 19, n. (*a*).

(*r*) 1 Jac. & Walk. 112.

(*s*) *Morris v. Preston*, 7 Ves. jun. 547.

what difference in value such a reservation made (*t*), and such a right would break in too much upon the enjoyment and ownership of a purchaser, to enable equity with propriety to compel him to take the estate with a compensation.

50. But a purchaser in this, as in every other case, may by his *conduct, after having notice of a charge like this, which is a permanent one, waive his right to object to it, and even leave himself no right to a compensation (*u*).

51. It is a fatal objection at law, that an enclosed estate is subject to a right of common every third year, which was not noticed in the contract (*x*) ; and equity, it is apprehended, would not hold it to be a subject for compensation against a purchaser, although he might be allowed to take the estate with a compensation.

52. But where an estate was sold with a representation in general terms that the purchaser would have an unlimited right of common, whereas it appeared that the right of common was limited to sheep only, that was held to be a subject for compensation (*y*).

53. But a seller cannot represent the estate as his freehold, and then require the purchaser to take what in effect are nothing but sheep-walks (*z*).

54. A right to dig for mines not disclosed would be a ground to set aside the contract at the instance of the purchaser (*a*). But where the purchaser does not object to the title on this ground, but insists upon a specific performance with a compensation, it will be decreed (*b*).

55. If the estate be liable to repair the chancel of a church, the purchaser, if he bought without notice of that liability, would not, it seems, be compelled to perform the contract with a compensation (*c*).

56. And where a house was sold by auction and no notice was taken of a fee-farm rent of 5*s.* 4*d.* charged upon that and upon other property of very great value, the purchaser brought an action for breach of contract, and Sir Vicary Gibbs for the vendor, the defendant, declined arguing the point (*d*).

(*t*) *Burnell v. Brown*, 1 Jac. & Walk. 168.

(*u*) *S. C.* see *post*.

(*x*) *Gibson v. Spurrier*, Peake's Add. Cas. 49 ; as to footways, see *post*.

(*y*) *Howland v. Norris*, 1 Cox, 59.

(*z*) *Vancouver v. Bliss*, 11 Ves. jun. 458.

(*a*) *Infra*.

(*b*) *Seaman v. Vaudry*, 16 Ves. jun. 390.

(*c*) See *Forteblow v. Shirley*, 2 Swanst. 223, cited. This is evidently *Hornblow v. Shirley*, 13 Ves. jun. 81 ; see ch. 10. s. 2, *post*.

(*d*) *Turner v. Beaurain*, Sitt. Guildh. cor. Lord Ellenborough, C. J. 2d June 1806 ; and see *Barnewall v. Harris*, 1 Taunt. 430.

57. But in equity it has been held, that quit-rents are subjects of compensation, probably because they are regarded as incidents of tenure (*e*).

58. As Sir John Leach observed, in *Esdaile v. Stephenson*, rentcharges are not incidents of tenure, but are created by the voluntary act of the vendor or those under whom he claims; and *he added, that it would be a good rule, that a purchaser should not be bound to complete his purchase unless they were noticed in the agreement or conditions of sale, but he feared that the habit of the Court had been, not to proceed upon the distinction between quit-rents and rent charges, but to compel the purchaser to complete where the rentcharge is small.

59. In Lord Thurlow's time, the rule was larger than it is now. He laid it down as settled, that wherever it is possible to compensate the purchaser for any article which diminishes the value of the subject matter, he must be satisfied with such compensation, or to speak in the usual terms, wherever the matter lies in compensation; but he could not lay down this rule as universal, for a case might be so circumstanced, that the party might have purchased purely for the sake of the very particular wanting.

60. Acting upon this rule, where an estate had been sold as tithe free, which turned out to be, with other lands, subject to 14*l.* per annum in lieu of tithes, Lord Thurlow held the charge to be a subject for compensation (*f*).

61. This was going a great way, and it has been justly observed, that no case is to be found where this doctrine of compensation has been applied beyond rentcharges of small amount (*g*).

62. And as a general rule—if it admit of any exceptions, it must be in a rare case—the Court will not, as we have seen, compel the purchaser to take an indemnity, nor the vendor to give it (*h*). But this subject will be resumed when we come to the consideration of the title to which a purchaser is entitled.

63. Where the *benefit* of quit-rents is sold, a mistake in their amount will not be material. In *Cuthbert v. Baker* (*i*) the quit-rents of a manor were stated in the particulars of sale, to be 2*l.* a year, and they amounted to only 30*s.* a year; but a specific performance was decreed, and it was referred to the Master to ascer-

(*e*) *Esdaile v. Stephenson*, 1 Sim. & Portman v. Mill, 1 Russ. & Myl. 696. Stn. 122; *Bowles v. Waller*, 1 Haycs, 411. (*h*) See 1 Ves. & Bea. 225, *post*, ch. 10, s. 2.

(*f*) *Howland v. Norris*, 1 Cox, 50.

(*g*) *Prendergast v. Eyre*, 2 Hog. 94;

(*i*) Reg. Lib. A. 1790, fol. 442.

tain what compensation should be allowed for the deficiency: and a mistake in the amount of quit-rents charged on the estate sold would be equally a subject of compensation.

*SECTION II.

OF WANT OF TITLE TO A PART OF THE ESTATE.

- | | |
|---|--|
| 1. <i>Mistake as to what is sold.</i> | <i>under it.</i> |
| 3. <i>Want of title to part fatal at law.</i> | 17. <i>Sale in lots good as to those with title.</i> |
| 4. <i>Separate valuations.</i> | |
| 5. <i>Enforced partially against purchaser where part small.</i> | 20. <i>Unless complicated with the rest.</i> |
| 6. <i>Sale of house and wharf.</i> | 22. <i>Rule acted upon at law.</i> |
| 7. <i>Opinions upon it.</i> | 25, 31. <i>Lord Kenyon's doctrine.</i> |
| 8. <i>Not binding on purchaser where portion large.</i> | 27, 29, 30. <i>Lord Eldon's.</i> |
| 9. <i>Fee-farm rent.</i> | 28, 29. <i>Lord Brougham's.</i> |
| 11. <i>Purchaser's right against seller where no title to large part.</i> | 31. <i>The present rule.</i> |
| 13. <i>Wheatley v. Slade.</i> | 34. <i>Where the seller has not all the tithes he sells.</i> |
| 14. <i>Observations upon it.</i> | 35. <i>Where the estate is not tithe free.</i> |
| 15. <i>Mutual contracts.</i> | 40. <i>Commutation of tithes by statute.</i> |
| 16. <i>Lease containing more than is held</i> | 41. <i>Land-tax and tithe-rent charge.</i> |
| | 42. <i>Purchaser's right bound by his conduct.</i> |
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1. If a purchaser of an estate thinks he has purchased *bona fide* a part which the vendor thinks he has not sold, that is a ground to set aside the contract, that neither party may be damaged; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only (*a*). Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling the part in question, then a pretence to have the whole

(a) See 13 Ves. jun. 427; and see *Higginson v. Clowes*, 15 Ves. jun. 516, stated, as to this point, *supra*, p. 37; and see *Neap v. Abbott*, C. Coop. 333; *Chamberlain v. Lee*, 10 Sim. 415.

conveyed is as contrary to good faith on his side as a refusal to sell would be in the other case (*b*).

2. A defect of the nature we are now about to consider, arises, either where the seller has not a good title to a portion of the estate *which he has sold, or having a good title to the estate, it does not contain the quantity represented in the contract.

3. As to the first line of cases: where an estate is sold in one lot, either by private contract, or public sale, and the vendor has not a title to the whole estate, he cannot enforce the contract at law. At law, indeed, neither a vendor can, on an entire contract, recover part of the purchase-money, where he cannot make a title to the whole estate sold; nor would a purchaser be suffered in a court of law to say, that he would retain all of which the title was good, and vacate the contract as to the rest: such questions being subjects only for a court of equity (*c*) (1).

4. In a case at law (*d*), where an estate consisting of a house and land was sold by private contract for 1,000*l.*, but there had been two distinct valuations, one of the house at 300*l.*, and the other of the land at 700*l.*, at which several prices the different properties, by a memorandum in writing signed by the sellers, had been agreed to be sold, previously to the more regular contract for the whole at one sum, the purchaser was evicted from the house for want of title in the sellers, before the conveyance was completed, and as he had built upon the land, he retained that, but brought an action for money had and received, to recover the money which he had paid for the land, in which he succeeded. Lord Alvanley, in delivering the judgment of the Court, observed, that his difficulty had been, how far the agreement was to be considered as one contract for the purchase of both sets of premises, and how far the party could recover so much as had been paid by way of consideration, for the part of which the title had failed, and retain the other part of the bargain. If the question were how far the particular part, of which the title had failed, formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say, that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the

(*b*) *Per* Lord Thurlow; see 1 Ves. jun. 211; and see 6 Ves. jun. 339.

(*c*) *Johnson v. Johnson*, 3 Bos. & Pull. 162.

(*d*) *Johnson v. Johnson*, *ubi sup.*

(1) See *Parham v. Randolph*, 4 Howard (Miss.) 435.

part which he retained might not have been sold, unless the other part had been taken at the same time, and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. The Court, however, held that there were two distinct contracts for the *house and land, and observed that it had not been suggested that they were necessary to the occupation of each other, and so the purchaser was allowed to recover.

5. But if the part to which the seller has a title was the purchaser's principal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price (1); and in these cases it will be referred to the Master, to inquire, "whether the part to which a title cannot be made, is material to the possession and enjoyment of the rest of the estate (e)." The question generally arises where the part to which a title cannot be made is comparatively small, for if it be a considerable portion, that upon the face of it would be deemed material; for when a man buys a large estate, he must be supposed to want what he buys; on the other hand, it matters not how trifling the subject is if it is necessary to the enjoyment of the rest, or was the purchaser's object in his purchase (2).

6. This equity was at one period exercised against purchasers to

(e) *M'Queen v. Farquhar*, 11 Ves. jun. *Bowyer v. Bright*, 13 Price, 698; see 467; Reg. Lib. B. 1804. fol. 1095; *Prendergast v. Eyre*, 2 Hogan, 81. *Knatchbull v. Grueber*, 1 Madd. 153;

(1) See *Buck v. M'Caughtry*, 5 Monroe, 230; *Pratt v. Law*, 9 Cranch, 458; *Simpson v. Hawkins*, 1 Dana, 305; *Collard v. Groom*, 2 J. J. Marsh. 488.

(2) See *Cooper v. Deme*, 1 Vesey jr. (Sumner's ed.) 565, 567, note (5) of Mr. Hovenden; *Reed v. Noc*, 9 Yerger, 283; *M'Kean v. Reid*, Litt. Sel. Cas. 395; *Parham v. Randolph*, 4 Howard (Miss.) 435. Where there is a substantial defect in the estate sold, either in the title itself, or in the representation or description of the nature, character, situation, extent, or quality of it, which is unknown to the vendee, and in regard to which he is not put upon inquiry, then, a specific performance will not be decreed against him. 2 Story Eq. Jur. §778; Fonbl. Eq. B. 1, ch. 3, §9, note (i); *Young v. Lillard*, 1 Marsh. 482; *Kelly v. Bradford*, 3 Bibb, 317; *Butler v. O'Hear*, 1 Desaus. 382; 2 Kent (6th ed.) 475, 476, 471, and notes; *Watts v. Waddle*, 6 Peters, 389.

Upon a like ground a party, contracting for the entirety of an estate, will not be compelled to take an undivided aliquot part of it. 2 Story Eq. Jur. §778; *Reed v. Noc*, 9 Yerger, 283; *Dalby v. Pullen*, 3 Sim. 29; S. C. 1 Russ. & My. 296; *Bates v. Delavan*, 5 Paige, 300.

an extent which is not now followed, but the stream of authority sets the other way (*f*). In a case (*g*) before Sir Thomas Sewell, a man who had contracted for the purchase of a house and wharf, was compelled to take the house, although he could not obtain the wharf, and the wharf appeared to be the whole object of his making the purchase; indeed, it is stated that his object was to carry on his business at the wharf.

7. Lord Thurlow said, that if he had been to have judged of that case, and if it had appeared that the purchaser was in a trade, in which that wharf was essentially useful, and that he made that purchase for the sake of his trade, he (Lord Thurlow) should not have thought that it interfered with the general rule, if he had discharged him from his contract (*h*). But this has been carried much further. Lord Kenyon said it was a determination contrary to all justice and reason, and the case has never been quoted without being disapproved of (*i*). It is quite clear, that if such a case *were now to call for a decision, although the purchaser did not require the wharf for his trade, yet if the house and wharf were connected together as one property, the want of title to the wharf would authorize the purchaser to rescind the whole contract. It would require some special ground in such a case to induce the Court to even direct an inquiry upon the subject (*l*).

8. This subject was fully discussed in a case before the late Master of the Rolls in Ireland, already referred to, where a title could not be made to one of the estates sold, containing 700 acres, which was sold subject to a fee-farm rent of 100*l.* per annum (*k*), and the purchaser was released from the whole of the contract.

(*f*) See 13 Price, 702.

(*g*) See 6 Ves. jun. 678; 7 Ves. jun. 270, cited; and see M'Queen v. Farquhar, 11 Ves. jun. 467.

(*h*) See 1 Cox, 61, 62.

(*i*) See 1 Esp. Ca. 152; 6 Ves. jun.

679; 13 Ves. jun. 78, 228, 427. In Stewart v. Alliston, 1 Mer. 26, Lord Eldon expressed himself much more strongly against the principle of these cases, than appears by the report.

(*k*) Prendergast v. Eyre, 2 Hogan, 81.

(1) "The good sense and equity of the law on this subject," says Mr. Chancellor Kent, "is, that if the defect of title, whether of land or chattels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchaser, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether." "If there be a failure of title to part, and that part appears to be so essential to the residue, that it cannot reasonably be supposed the purchase would have been made without it; as in the case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value; the contract may be dissolved *in toto*." 2 Kent (6th ed.) 475, 476; Parham v. Randolph, 4 How. (Miss.) 435. See Pringle v. Witten, 1 Bay, 256; Gray v. Handkinson, *ib.* 278; Tunno v. Flood, 1 M'Cord, 121; Marvin v. Bennett, 8 Paige, 312; Stoddart, v. Smith, 5 Biunev, 355, 363; Waters v. Travis, 9 John. 465.

The Court stated the result of the authorities to be, that though this principle of compensation had in some instances, in relation to some fragments or small parts of an estate sold, or of the rights appurtenant or incidental to it, been applied *in invitum* against a purchaser, that it was a principle that ought not to be extended to new classes of cases. There was no case of the sale of two distinct estates for one entire sum, in which the Court had undertaken, upon a failure of title as to one estate, to decompose the sum and fix a standard for adjusting the relative value of the two estates, which should bind the purchaser without regard to his views or estimate of relative value. It appeared to be inconsistent with the principles upon which the Court professed to exercise jurisdiction in specific performance, to compel the purchaser, not bound by law, and who could not get the thing for which he contracted, to take one of the estates he purchased, and accept a compensation for the other estate. Where would you stop? The result appeared to be, that no cases were to be found where this doctrine of compensation had been applied beyond small parcels of land, and that no universal principle of compensation had been laid down which would apply to sales of distinct townlands or denominations. These appear to be the true principles, and they have always been acted upon in the English Courts of equity; and in speaking of compensation generally, the rule has always been so understood.

9. And the rule would, no doubt, be the same, even where the estate to which a title cannot be made, is let upon a fee-farm grant at a large rent, for although the purchaser can only receive the rent, yet he may have an object in holding such a rent issuing out of an estate, particularly if the estate be connected with the other property or with his own. And where one of the subjects of sale is a rentcharge, to which a title cannot be made, he cannot be *told that it is to be treated as a mere annuity unconnected with land (1).

10. There are many cases where the purchaser might elect to take the portion of the estate to which a title could be made, although the vendor could not compel him to do so.

11. We have seen that the purchaser cannot be compelled to

(1) S. C. Neither of these points was decided in this case. There appears to be a mistake at the close of the judgment, p. 95, which will be seen by reference to p. 82.

take a compensation for a large portion of the estate (1). In regard to the limits of the rule, that a purchaser may elect to take the part to which a title can be made at a proportionate price, Sir W. Grant, Master of the Rolls, in *Western v. Russell* (*m*), observed, that it was said there, that there was a considerable portion of the estate to which no title could be made, and, therefore, there could be no execution of the contract. That defence, he said, simply so stated, was quite new in the mouth of the vendor. It was not necessary there to determine whether, under any circumstances of deterioration to the remaining property, the vendor could be exempted from the obligation of conveying that part to which a title could be made; but the proposition was quite untenable, that if there is a considerable part to which no title could be made, the vendor was therefore exempted from the necessity of conveying any part (2).

12. The observations of the Court, in *Johnson v. Johnson*, already quoted, bear also upon this point (*n*), and undoubtedly there may be cases where the hardship of enforcing a partial execution of the contract on the vendor, would be so great, that equity would not interfere. A seller, for example, could not, at the election of the purchaser, be deprived of his mansion-house and park, to which he could make a good title, whilst a large adjoining estate, held and sold with it, would be left on his hands with a proclaimed bad title.

13. In the case of *Wheatley v. Slade* (*o*), a lace manufactory was sold for 12,200*l.*; it appeared that the sellers were entitled to nine-sixteenths only, and that the owner of the other seven-sixteenths had a lien on the entirety of the property for 10,000*l.* and interest. The purchaser filed a bill for a specific performance as to the nine-sixteenths, at a fair proportion of the price. The Vice-Chancellor said, that in *Hill v. Buckley*, it was decided that a purchaser might file a bill and insist on having the agreement performed, as far as

(*m*) 3 Ves. & Bea. 187.

(*n*) *Supra*, p. 356.

(*o*) 4 Sim. 126.

(1) Ante, 346, 347 and cases in notes; *Evans v. Kingsbury*, 2 Randolph, 120; *Jones v. Belt*, 2 Gill, 106; *Morss v. Elmendorf*, 11 Paige, 277. "The general rule in all such cases," says Mr. Justice Story, "is, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description, or other matters touching the estate." 2 Story Eq. Jur. §779; *Morss v. Elmendorf*, 11 Paige, 277; *Voorhees v. De Meyer*, 2 Barbour Sup. Ct. Rep. 37; *Wiswall v. McGown*, 2 Barbour Sup. Ct. Rep. 270. But the vendor cannot be required to convey a different parcel of land from that agreed to be conveyed. *Morss v. Elmendorf*, 11 Paige, 277; *Beverley v. Lawson*, 3 Munf. 317.

(2) Ante, 357, 358 notes.

the vendor was capable of performing it, and that a deduction should be made to him in respect of the deficiency, *but that was not *allowed where a large portion of the property could not be conveyed.* This sale, he observed, was made under the impression that they were possessed of the entirety of it ; but that it afterwards appeared, that they could make a title to nine-sixteenths only of the property, and that it was subject to a debt of 10,000*l.* and interest, which would exhaust nearly the whole of the purchase-money. He therefore dissolved an injunction to prevent the sellers from selling to any other person, as the Court at the hearing would not deal with this case as it dealt with *Hill v. Buckley*.

14. This decision may, perhaps, be referred to the nature of the property—although the sellers' object appears to have been to get rid of one sale in order to join in another—otherwise it might be difficult to support it, for whatever was really the number of the shares to which the sellers were entitled, they were bound to that extent to pay the charges, and it is no objection to the performance of a contract that the charges on the estate, will, contrary to the sellers' expectation, exhaust the purchase-money. If the case be reduced to the simple one, that the sellers had only nine-sixteenths, although they considered they had the entirety, the authorities would seem to show that the purchaser had a right to those shares at a price *pro tanto*: no hardship would have been thrown upon the sellers ; they would not have had the other shares left on their hands with a bad title, for the nine-sixteenths were all the shares they possessed ; the owner of the other seven-sixteenths was a party to the suit, and his title was undisputed by the sellers of the nine-sixteenths (1).

15. A case may here be introduced of a contract by *A* to sell one estate to *B*, and by *B* to sell another estate to *A*. It has been held as a general proposition, that although entered into by the same instrument, they are several contracts, and either *A* or *B* may compel the other to convey his estate to him, although he himself cannot make a title to the estate which he contracted to sell. But it was said, that cases might undoubtedly be supposed, in which two transactions might be so complicated together, that when they were made the subject of contract in one, or even in two different instruments, a purchase by one party should not be binding unless a sale to the vendor should also be completed. Where two estates were conterminous, or where there was a mixed

(1) See ante, 357, in note.

case of enjoyment of the estates, as in the case of one of the parties having an easement over the property of the other, a contract depending upon such mutuality as to sale on one side and purchase upon the other might well exist (*p*).

*16. And here we may notice a case where the estate sold consisted of several houses, which it was stated were held under lease from *A*, and upon examination it appeared that the lease comprised a small piece of ground formerly held with one of the houses, but divided from it previously to the lease, and let to another; the purchaser was allowed to recover his deposit. For he would be liable under the covenants for the whole as demised, and although he would have been entitled to relief in equity against the lessors, yet he was not to be satisfied with that in a court of law (*q*).

17. Where an estate is sold by auction, or before a Master, in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest; and will allow him a compensation *pro tanto* (1).

18. Thus in *Poole v. Shergold* (*r*), a man became the purchaser of several lots of an estate, to two of which no title could be made, but there had been no reference on the question whether the lots were so complicated with each other as to render the lots to which there was no title necessary to the enjoyment of the others. And upon the Master's report Lord Kenyon said, he must take it for granted, these two lots were not so complicated with the others, as to entitle the purchaser to resist the whole: and therefore decreed a specific performance *pro tanto*.

19. But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made.

20. Thus, in the same case, Lord Kenyon said, if a purchase was made of a mansion-house in one lot, and farms, &c., in others, and no title could be made to the lot containing the mansion-house, it would be a ground to rescind the whole contract.

(*p*) *Croome v. Lediard*, 2 Myl. & Kee. 251, 293. (*r*) 2 Bro. C. C. 118, 1 Cox, 273. See 6 Ves. jun. 676; 2 Myl. & Kee. 727.

(*q*) *Tomkins v. White*, 3 Smith, 435.

(1) *Van Eps v. Schenectady*, 12 John. 436; *Stoddart v. Smith*, 5 Binn, 355; *Waters v. Travis*, 9 John. 450.

21. The same rule appears to prevail at law, for although where the same man purchases several lots at an auction, a distinct contract arises upon each (s) (1), yet even a court of law is at liberty to look at the nature of the property, and will permit a purchaser to rescind the contract as to all the lots if a title cannot be made to any which are necessary to the enjoyment of the rest.

*22. Thus in a case at *nisi prius* (t), where the property was represented as freehold, but no notice was taken that a meadow, part of it, was liable to a right of common every third year: the plaintiff purchased two lots, one a house, garden, &c., the other the meadow close adjoining thereto, and which he wished to occupy with it: the question was, whether the purchaser could rescind the contract as to both lots in consequence of the right of common over the meadow, one of the lots. Lord Kenyon said, that if these lots were so near each other that the hope of possessing one as an appendage to the other was the inducement to the purchaser to purchase both, he ought not to be compelled to take one alone. This, he added, was not so much a question of law as a matter of convenience: it would be saddling a man with an estate for which he might have no use.

23. And in a late case (u), where a purchase by auction of a lot, numbered 13, was held not to be binding, because a right of way over it had not been sufficiently disclosed, and the same purchaser had bought an adjoining lot, No. 12, containing a house, which was to have a right of way over the lot 13, he was allowed to rescind the purchase as to lot 12 also, upon the ground that both lots had been included in one agreement after the sale at the aggregate price—which is not a very strong ground—and secondly, that he might be reasonably understood to have purchased lot 12, in order that he might by unity of seisin extinguish the right of way over lot 13, which before belonged to lot 12, and thereby render lot 13 more valuable as building ground, an object and purpose which was entirely defeated by the existence of the undisclosed right of way.

24. Lord Kenyon has been considered as having decided, in *Chambers v. Griffiths*, at *nisi prius*, that in no case could a con-

(s) *Emmerson v. Heelis*, 2 Taunt. 38; *Booth*, 4 Adol. & Ell. 528.
James v. Shore, 1 Stark. Ca. 426; see (t) *Gibson v. Spurrier*, Peake's Add.
Baldey v. Parker, 2 Barn. & Cress. 37; Cas. 49.
 3 Dowl. & Ry. 220; *Roots v. Lord Dor-*
mer, 4 Barn. & Adol. 77; *Seaton v.* 463.
 (u) *Dykes v. Blake*, 4 Bing. N. C.

(1) Ante, 43.

tract be enforced even at law as to some lots if a title could not be made to all the lots sold.

25. In that case (*x*), he held, that the performance of a contract for the sale of some houses ought not to be compelled, as a title could not be made to all the houses bought; and this, notwithstanding they were sold in separate lots. He said, when a party purchases several lots of this description at an auction, it must be taken as an entire contract; that is, that the several lots are purchased with a view of making them a joint concern. The seller therefore shall not, in case of any defect in his title to one part, be *allowed to abandon that part at his pleasure, and to hold the purchaser to his bargain for the residue. From such a doctrine much injustice might result, as the part to which a seller could not make a title might be so circumstanced, that without it the other parts would be of little, perhaps of no value; or it might leave it in the power of the seller, or any other person who might come to the possession of such part, to deprive the purchaser of every degree of enjoyment or beneficial use of that part which he had purchased. He added, that a case *under circumstances precisely similar to the present*, had been decided before him, when Master of the Rolls. That, on that case coming before him, he had found that his predecessor there, Sir Thomas Sewell, had ruled contrary to the doctrine he was now delivering; but that he at the Rolls had overruled Sir Thomas Sewell's determination, with the general approbation of the bar (1).

26. And the Court of Exchequer seemed to have been of the same opinion as Lord Kenyon. - For in a case (*y*) where a person purchased several lots of an estate sold under a decree of the Court, and the biddings were afterwards opened as to one lot, the Court were of opinion, that he had an option to open the biddings as to the rest of the lots.

27. In a case before Lord Eldon (*z*), in which most of the authorities on this head were cited, that of *Chambers v. Griffiths* was not noticed, and the report of *Gibson v. Spurrier* was not then published. But Lord Eldon afterwards mentioned from the Bench, that he had met with the case of *Chambers v. Griffiths*, and he desired it to be understood, that he was not of the same opinion as Lord Kenyon;

(*x*) *Chambers v. Griffiths*, 1 Esp. Ca. 149.

(*y*) *Boyer v. Blackwell*, 3 Anstr. 657.

(*z*) *Drewe v. Hanson*, 6 Ves. 675.

(1) See *Hepburn v. Auld*, 5 Cranch, 262; *Osborne v. Bremar*, 1 Desaus. 486; *Van Eps. v. Schenectady*, 12 John. 436, 443.

and in a still later case Lord Eldon expressed an opinion that Lord Kenyon's rule would not be followed unless it could be shown that there was an understanding that the purchaser was not to take any of the lots unless he could obtain them all (a).

28. In a late case before Lord Brougham, L. C. (b), in which he disagreed with Lord Kenyon's opinion in *Chambers v. Griffiths*, he observed, that Lord Eldon was said to have expressed a similar opinion in *Drewe v. Hanson*, but if so it had escaped the reporter. Lord Eldon's observation was mentioned shortly after it was made in the *first edition* of this work, and it was stated to have fallen from him *after* he had decided *Drewe v. Hanson*, which accounts for its having escaped the reporter. There is no doubt that Lord Eldon did make the observation, and the statement of it in this work must ^{*}have been under his eye upon more than one occasion: we have therefore his great authority against the doctrine of Lord Kenyon. It was considered by the Court, in the case just referred to, that *Chambers v. Griffiths* was plainly overruled by the cases at law, establishing that a separate contract arises upon the sale of each lot. But that, although true as a general rule, does not, as we have seen, in proper cases, prevent even courts of law from allowing a purchaser to treat a bad title to one lot as affecting the sale of all the lots to the same purchaser, nor did the Courts in any of the cases referred to express any opinion adverse to that right.

29. It was further observed by the Court, in the case above quoted (c), that if Lord Kenyon's reported opinion, but which he probably never held, carried the rule so much too far in favor of the purchaser, perhaps an opinion ascribed to Lord Eldon, and mentioned in this work (d), carries the rule almost as far the other way—that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly it was said such an understanding will suffice to blend the whole into one contract; but it seemed equally clear, that the same complication may be effected or rather evidenced without any such understanding, that is without any express agreement to that effect.

30. Now, Lord Eldon, in the opinion which he gave, did not intend to touch the general rule, where it is shown that the lots are complicated with each other, but merely said that Lord Kenyon's

(a) 16 July 1816. MS.

(b) *Casamajor v. Strode*, 2 Myl. & Kee.

724.

(c) 2 Myl. & Kee. 725.

(d) *Supra*, p. 363.

rule would not be followed, unless it could be shown that there was an understanding to that effect; or, in other words, that where it is not shown that the lots are complicated with each other, a purchaser cannot for want of title to one lot rescind the sales as to all the lots, unless it could be shown that there was such an understanding.

31. There is no doubt that the rules laid down in the case of *Poole v. Shergold*, are the law of the Court (*e*). Lord Kenyon, in *Gibson v. Spurrier*, actually adopted in a court of law the rule in equity upon this subject; and it is clear, although the reference in *Chambers v. Griffiths*, to the case at the Rolls, is an inaccurate one (*f*), that Lord Kenyon did refer to *Poole v. Shergold* as having been decided by him with the general approbation of the bar. He intended therefore to follow, and not to overrule his own previous views when sitting as a judge in equity; and his opinion was probably *grounded upon the nature and contiguity of the property; for he said that when a party purchases several lots of *this description* at an auction, it must be taken that the several lots are purchased with a view of making them a joint concern: he seems therefore rather to have been guided by the circumstances of the case, than to have intended to lay down a general rule. Indeed, he said, that his decision at the Rolls was in a case (*Poole v. Shergold*) *under circumstances precisely similar* to that of *Chambers v. Griffiths*. The seller, besides, sent an abstract of title to one lot only, and no abstract of title to the other lots. And of course in such a case, whatever may be the rule where a seller really has a bad title, which is produced, to some of the lots, he cannot be allowed at his pleasure to withhold any title to some of the lots, and enforce the contract as to the others.

32. The opinion expressed by the Court of Exchequer in *Boyer v. Blackwell*, before quoted (*g*), is a very just one; but it may be referred to a different ground, for there the seller was not unable to make a good title to all the lots, but he was desirous of withdrawing some of the lots from the purchaser, because he had a better offer for them. It would plainly be inequitable to allow such a proceeding. There appears therefore to be no authority against the settled rule in these cases, either at law or in equity.

33. We are now to examine the cases relating to title. Where

(*e*) See *Lewin v. Guest*, 1 Russ. 325;
Harwood v. Bland, 1 Flan. & Kel. 540.

(*f*) See 2 Myl. & Kee. 725.

(*g*) See p. 363.

they are sold as a distinct existing property, they are—regard being had to the different natures of the properties—subject to the rules already quoted, but where they are the tithes of the very land contracted to be purchased, they rather open to a different consideration.

34. In *Drewe v. Hanson* (*h*), which arose upon the sale of an estate, together with the valuable corn and hay tithes of *the whole parish*, it appeared that the principal object of the purchaser was the corn tithes, and that half the hay tithe belonged to the vicar, and the other half was commuted for by a payment of 2*l.* per annum, the nature of which did not appear. Upon the facts, as they then appeared, Lord Eldon would not give judgment, but he seemed clearly of opinion that the hay tithe, if not of great extent or of such a nature as to prejudice the corn tithe, was a subject for compensation; but otherwise not, as the purchaser would not get the thing which was the principal object of his contract (*i*).

35. In a case (*k*) often cited, where a man had articted for the *purchase of an estate *tithe-free*, but which afterwards appeared to be subject to tithes, Lord Thurlow, it was said, decreed a specific performance, although the purchaser proved, that his object was to buy an estate *tithe-free*. This, however, to use Lord Eldon's words (*l*), is a prodigious strong measure in a court of equity to say, as a discreet exercise of its jurisdiction, that the contract shall be performed, the defendant swearing and positively proving that he would have had nothing to do with the estate if not *tithe-free*. But it now appears from the report of the case, published by Mr. Cox, that the estate was subject only to a money-payment of 14*l.* in lieu of tithes (*m*); and therefore Lord Thurlow made no such decision. And in the case of *Ker v. Cloberry* (*n*), where the estate was sold before the Master, and the particulars stated; that "the whole of the above lands are only subject to a *modus* for tithe hay of 2*l.* per annum," Lord Eldon was of opinion, that a purchaser of an estate stated to be *tithe-free*, or subject to a *modus*, could not be compelled to take it with a compensation, if the estate is not *tithe-free*. He said, that he had so decided in a case from Yorkshire, in which he had told the purchaser, if he would take the

(*h*) 6 Ves. jun. 675.

(*i*) See *Vancouver v. Bliss*, 11 Ves. jun. 458; *Stapylton v. Scott*, 13 Ves. jun. 425.

(*k*) Lord Stanhope's case, 6 Ves. jun. 678, cited; *Lowndes v. Lane*, 2 Cox, 363; 6 Ves. jun. 676, cited; but see

Pincke v. Curteis, cited *ibid.*; and see *Rose v. Calland*, 5 Ves. jun. 186; *Wallinger v. Hilbert*, 1 Mer. 104.

(*l*) See 6 Ves. jun. 679; and see 17 Ves. jun. 280.

(*m*) *Howland v. Norris*, 1 Cox, 59.

(*n*) 26 Mar. 1814. MS.

estate with a compensation, he must undertake to pay the tithes to the vendor (I). The question therefore is now at rest.

36. Where an estate is sold tithe-free, the question whether tithe-free is not a question of title but of fact: if the sale was of lands and of tithes, then the matter of tithe would be matter of title (o).

37. In a late case, upon a sale before a Master, where the particular stated *about* thirty-three acres to be tithe-free, and it was stipulated in the conditions of sale, that errors of description should not vitiate the sale, Lord Eldon held, that the principle laid down in *Ker v. Clobery* did not apply (p); but the purchaser must be satisfied with a compensation.

38. And where a mansion-house and pleasure-grounds, and seven acres of pasture were sold, without any mention of tithes, but *it being discovered that the seller's conveyance contained a grant of the great tithes, which fact being communicated to the purchaser's agent, he included them in the written contract, but no additional price was put upon them, nor was there any treaty about them; upon an objection to the title to the tithes, the Court held, that the right to the tithes could not possibly be the inducement of the purchaser to enter into the contract; and it was not easy to see how they could be of the value of the smallest piece of coin, since, as an appendage to the enjoyment of the mansion-house, there was no probability that the seven acres would ever be productive of great tithes (II). The purchaser was not allowed to escape upon this pretence; and it seems that no compensation would have been allowed him had not the seller offered it (q) (1).

39. Where the particular described the estate as four hundred and twelve acres, two hundred and twenty-seven of which were tithe-free, paying a very small modus; and it appeared that part of the estate represented to be tithe-free was subject to tithes

(o) *Smith v. Lloyd*, 2 Swanst. 224, n.;
Wallinger v. Hilbert, 1 Mer. 104.

(p) *Binks v. Lord Rokeby*, E. T. 1818.
 MS.; S. C. 2 Swanst. 222; and see

Smith v. Tolcher, 4 Russ. 302; where
Binks v. Lord Rokeby is not accurately
 quoted in the judgment.

(q) *Smith v. Tolcher*, 4 Russ. 302.

(I) In *Binks v. Lord Rokeby*, where the purchaser had a compensation, as the fact was not satisfactorily established, Lord Eldon said there seemed little reason to doubt that the vendee [misprinted vendor] would eventually obtain both a compensation for a supposed liability of part of the estate to tithe, and also the advantage of the fact that it was not liable.

(II) Why not? If a crop of hay had been taken there would have been a great tithe.

(1) See ante, 357, 358, in notes.

which the owner was willing to sell, Lord Eldon said, that the allegation was, that two hundred and twenty-seven acres "are tithe-free, paying a very small modus," not stating a positive exemption from tithes; and where the contract is to sell an estate tithe-free, the vendor not representing himself to have title to the tithes, without entering into the question, whether the purchaser ought to be compelled to take it if not tithe-free; yet, if he chooses to take it, he cannot compel the vendor to buy the tithes, if there is a positive title to them in pernaney; all he can have is compensation (*r*) (1).

40. These points will soon cease to be important: for the commutation of tithes in England and Wales for rentcharges is provided for (*s*), and in due time, with few exceptions (*t*), all lands will be absolutely discharged from tithes (*u*); and corn-rentcharges will be payable in lieu of them, with powers of distress and entry and enjoyment of the land for securing them (*x*). And owners of both lands and tithes (*y*), even tenants for life (*z*), are empowered to merge the tithes in the lands; and in Ireland tithes are abolished, and rentcharges substituted for them (*a*).

*41. Tithe, like land-tax, has never been deemed an incumbrance, and therefore, if nothing is said upon the subject, the purchaser must take the estate subject to its liability; and where the estate is free from land-tax or tithe, and the non-liability is not mentioned, yet the seller cannot require any allowance on account of the estate being discharged. Now, the rentcharge will probably not be noticed, unless it be a low one; but although the particulars or agreement are silent on the subject of tithe, yet the purchaser will not have a right to object to the rentcharge, although a like rentcharge payable to an individual might be fatal to the contract, because every estate, where nothing is said to the contrary, is presumed to be subject to tithes, and now rentcharges are substituted for tithes.

42. If a purchaser, with notice of a defect in a title to a part of the estate which is complicated with the rest, or which is the principal object of his contract, take possession of the estate, and prevent the vendor from making a title, he will be compelled to perform

(*r*) *Todd v. Gee*, 17 Ves. jun. 273; *qu.* how is the compensation to be estimated? See *Ker v. Clobery*, *supra*.

(*s*) 6 & 7 Will. 4, c. 71; 1 Vict. c. 69.

(*t*) Sect. 90.

(*u*) Sect. 67.

(*x*) Sect. 81, 82, 83, 84, 85.

(*y*) Sect. 71.

(*z*) 1 & 2 Vict. c. 64.

(*a*) 1 & 2 Vict. c. 109.

(1) See *Wainwright v. Read*, 1 Desaus. 573.

the contract, notwithstanding that he insisted upon the objection at the time he entered (*b*). A deduction from the price will, however, be allowed him, although the situation of the land will not perhaps be taken into consideration.

43. To guard against the rules established by the foregoing decisions, an express declaration should be inserted in all agreements for purchase of estates, that if a title cannot be made to the whole estate, the purchaser shall not be bound to perform the contract *pro tanto*; and a similar provision should be made where an estate is bought free from tithes, or with any other collateral benefit, which the purchaser may wish to secure.

(*b*) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

*SECTION III.

OF DEFECTS IN THE QUANTITY OF THE ESTATE.

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| 1. <i>Compensation for deficiency.</i> | 13. <i>Where quantity greatly exceeds that sold.</i> |
| 3. <i>Though not sold by the acre.</i> | 14. <i>Lands shown to purchaser, but excepted in conveyance.</i> |
| 4. <i>Lands conveyed by estimation.</i> | 15. <i>Sale by particular, and part omitted.</i> |
| 5. <i>Contract for sale by estimation.</i> | 16. <i>Where more is conveyed than was sold.</i> |
| 6. <i>By estimation, more or less.</i> | 18. <i>General description: copyholds.</i> |
| 8. <i>Stipulation that excess or deficiency not to be answered for.</i> | 19. <i>Contents of an acre: old law.</i> |
| 9. <i>Fraudulent statement.</i> | 21. <i>Customary acres.</i> |
| 10. <i>Purchaser's knowledge of estate.</i> | 23. <i>Contents of an acre: new law.</i> |
| 11. <i>About the quantity stated.</i> | 24. <i>Contracts, how affected by statute.</i> |
| 12. <i>Principle of abatement.</i> | |
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1. WE are now about to consider those cases in which the whole of the estate is well vested in the seller, but the quantity of its acreage has been misrepresented. This is a question of quantity: the one already considered is a question of title.

2. If an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to a

compensation (1), although the estate was estimated at that number in an old survey (a).

3. The rule is the same, though the land is neither bought nor sold professedly by the acre; the presumption is, that in fixing the price, regard was had on both sides to the quantity which both suppose the estate to consist of. The demand of the vendor, and the offer of the purchaser, are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain. The general rule therefore is, that where a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can give, with an abatement out of the purchase-money, for so much as the quantity falls short of the representation (b) (2).

4. But where the lands *in a conveyance* are mentioned to contain so many acres *by estimation*, or the words "more or less" are *added, if there be a small portion more than the quantity, the vendor cannot recover it; and if there be a small quantity less, the purchaser cannot obtain any compensation in respect of the deficiency (c). Indeed, a case is said to have been decided, where a

(a) *Sir Cloudesley Shovel v. Bogan*, 2 Eq. Ca. Abr. 688, pl. 1.

(b) *Hill v. Buckley*, 17 Ves. 394, *per* Sir William Grant.

(c) *Twyford v. Warcup*, Finch, 310.

See *Marquis of Townshend v. Stangroom*, 6 Ves. jun. 328; *Rushworth's case*, Clay. 46; *Neale v. Parkin*, 1 Esp. Ca. 229.

(1) *Stebbins v. Eddy*, 4 Mason, 414; *Whaley v. Eliot*, 1 A. K. Marsh. 343; *Nelson v. Carrington*, 4 Munf. 332; *Harrison v. Talbot*, 2 Dana, 266; *Grant v. Combs*, 6 Monroe, 281; *Bierne v. Erskine*, 5 Leigh, 59. See *Hoffman v. Johnson*, 1 Bland, 109; *Murdock v. Beal*, ib.

(2) *Ante*, 359 note; *Reynolds v. Vance*, 4 Bibb, 215; *Bond v. Jackson*, 3 Hayw. 189; *Quesnel v. Woodlief*, 6 Call, 218; S. C. 2 Hen. & Munf. 173, note; *Nelson v. Carrington*, 4 Munf. 332; *Wainwright v. Read*, 1 Desaus. 573; *Glover v. Smith*, 1 Desaus. 433; *ante*, 350; *Durrett v. Simpson*, 3 Monroe, 519. Even where there is a positive statement of the quantity of acres, much may depend upon the manner and connection of the statement, and the nature of the contract or conveyance, whether it is to be deemed mere description, or of the essence of the purchase. *Stebbins v. Eddy*, 4 Mason, 417, 418. See *Mann v. Pearson*, 2 John. 37; *Powell v. Clark*, 5 Mass. 355; *Dayne v. King*, 1 Yeates, 322; *Smith v. Evans*, 6 Binney, 102; *Boar v. McCormick*, 1 Serg. & R. 164; *Jackson v. Barringer*, 15 John. 471. Where a specified tract of land is sold for a sum in gross, the boundaries of the tract control the description of the quantity it contains; and neither party can have a remedy against the other for an excess or deficiency in the quantity; unless such excess or deficiency is so great as to furnish evidence of fraud, or misrepresentation. *Voorhees v. De Meyer*, 2 Barbour Sup. Court Rep. 37. This rule, however, does not apply to a case, where the mistake is in the *boundaries* of the tract sold; and not in the thing described, but in the ability of the vendor to convey the thing described. *Voorhees v. De Meyer*, 2 Barbour Sup. Court Rep. 37. As, if the vendor and vendee, knowing a certain tract of land to contain a certain number of acres, suppose it all to belong to the vendor, and the sale is made of the whole tract by its boundaries, but those boundaries include a parcel of land which does not in fact belong to the vendor, the vendee will be entitled to relief. *ib.*

man conveyed his land by the quantity of one hundred acres, were it more or less, and it was not above sixty acres; but the purchaser had no relief, because it was his own laches (*d*) (1).

(*d*) Anon. 2 Freem. 106.

(1) Where a lot or farm is sold in gross, or by its boundaries, and is conveyed by a deed containing the words "*more or less*," such words being inserted upon deliberation, because neither party professes to know the precise quantity of land conveyed, and it is afterwards found that the quantity of land is less than the parties supposed, in the absence of any fraud or intentional misrepresentation, the Court of Chancery will not interfere for the relief of the purchaser. *Marvin v. Bennett*, 8 Paige, 312; *S. C.* 26 Wendell, 169; *Weaver v. Carter*, 10 Leigh, 37; *Enbank v. Hampton*, 1 Dana, 343, 344; *Stebbins v. Eddy*, 4 Mason, 414; *Brown v. Parrish*, 2 Dana, 9; *Jackson v. McConnell*, 19 Wendell, 175; *Jackson v. Moore*, 6 Cowen, 706; *Lush v. Druse*, 4 Wendell, 313; *Pedens v. Owens*, Rice Eq. 55; *Whicker v. Crews*, 1 Iredell Eq. 351. See *Nelson v. Matthews*, 2 Hen. & Munf. 164; *Grantland v. Wight*, 2 Munf. 179; *Hampton v. Enbank*, 4 J. J. Marsh. 634; *Cleveland v. Rodgers*, 1 A. K. Marsh. 193; *Fleet v. Hawkins*, 6 Munf. 188; *Perkins v. Webster*, 2 N. Hamp. 287; *Large v. Penn*, 6 Serg. & R. 488; *Williford v. Bentley*, 5 J. J. Marsh. 118; *Glen v. Glen*, 4 Serg. & Rawle, 493; *Galbraith v. Galbraith*, 6 Watts, 117. An agreement was made to convey "the Hawkins place, containing one hundred acres;" the clause "containing one hundred acres," was rejected as surplusage; and the contract was held to cover the whole lot surveyed and set off to Hawkins, and upon which he entered, improving part, under a parol contract of purchase, though it in fact contained one hundred and six acres. *Butterfield v. Cooper*, 6 Cowen, 481. See *Pedens v. Owens*, Rice Eq. 55; *Whicker v. Crews*, 1 Iredell Eq. 351. In *Stebbins v. Eddy*, 4 Mason, 419, 420, Mr. Justice Story said;—"The latest cases generally concur with the doctrine laid down in the Anonymous case in 2 Freeman, 106. It seems to me, that there is much good sense in holding, that the words "*more or less*," or other equivalent words, used in contracts or conveyances of this sort, should be construed to qualify the representation of quantity in such a manner, that, if made in good faith, neither party should be entitled to any relief on account of a deficiency or surplus. Nor am I prepared to admit that the fact, that the sale is not in gross, but for a specific sum, by the acre, ought necessarily to create a difference in the application of the principle. I do not say, that cases may not occur of such an extreme deficiency as to call for relief; but they must be such as would naturally raise the presumption of fraud, imposition, or mistake in the very essence of the contract. Where the sale is fair, and the parties are equally innocent, and the quantity is sold by estimation, and not by measurement, there is little, if any, hardship, and much convenience, in holding to the rule, *caveat emptor*." See *Smith v. Evans*, 6 Bin. 109; *Boar v. McCormick*, 1 Serg. & Rawle, 166; *Glen v. Glen*, 4 Serg. & Rawle, 488; *Jones v. Plater*, 2 Gill, 125; *Bailey v. Snyder*, 13 Serg. & Rawle, 160; *Phillips v. Scott*, 2 Watts, 318.

A sale was at first made of a farm upon a contract of so much per acre, to be ascertained by measurement. Afterwards the parties agreed to waive any measurement, and the vendee took the farm at the gross sum of \$2500, supposing it to contain fifty acres, from the representation of the vendor; and in the deeds of conveyance the land was stated to contain forty-seven and a half acres, "*more or less*." Mr. Justice Story held, that, as the vendor was not guilty of any fraudulent misrepresentation, but expressed his *bona fide* belief, the vendee was not entitled to relief in equity, although the quantity turned out, upon subsequent measurement, to be forty and one-half acres only, each party having been well acquainted with the local boundaries of the farm. *Stebbins v. Eddy*, 4 Mason, 414. See *Smith v. Evans*, 6 Binney, 102, in which there was a deficiency of 88 acres in 991½ acres, and no relief granted; and *Howes v. Barker*, 3 John. 506, in which there was a deficiency of twelve acres in 275, and no relief granted *at law*. See as to the power of equity in such a case, *ib.* p. 510, 511, per Kent Ch. J. In *Mann v. Pearson*, 2 John. 37, the land was described as a certain lot containing 600 acres, in the bond or agreement to convey. A deed, describing the lot, and as containing 600 acres, to be the same more or less, was held to be a performance

5. That however was the case of an actual conveyance (1). Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words *more or less*, or *by estimation* (e) (2).

6. But in a case where the estate was stated in the contract to contain *by estimation* forty-one acres, *be the same more or less*; and upon an admeasurement, the quantity proved to be only between thirty-five and thirty-six acres; and the purchaser claimed an abatement; the Master of the Rolls decided against the claim. He said, that the effect of the words "more or less" added to the statement of quantity had never been absolutely fixed by decision; being considered sometimes as intending to cover only a small difference the one way or the other (3); sometimes as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it. In the instance before him, the description was rendered still more loose by the addition of the words "by estimation." The estimated extent of ground frequently proved quite different from its

(e) *Hill v. Buckley*, 17 Ves. 394.

of the stipulation, although the lot in fact contained only 421½ acres. See *Farmers and Mech. Bank v. Galbraith*, 10 Barr, 490; *Frederick v. Campbell*, 13 Serg. & Rawle, 136; *M'Lelland v. Creswell*, ib. 143. Mr. Chancellor Kent says;—"Whenever it appears by the definite boundaries, or by words of qualification, as "more or less," or as "containing by estimation," or the like, that the statement of the quantity of acres in the deed is mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case." 4 Kent (6th ed.) 467. See *Innis v. McCrummin*, 12 Martin (Louis.) 425; *Lesassier v. Dashiell*, 13 Louis. 151; *Phelps v. Wilson*, 16 ib. 185; *Morris Canal Co. v. Emmett*, 9 Paige, 168. But he adds in a note, "A very great difference (as thirty-three per cent. for instance,) between the actual and the estimated quantity of acres of land sold in the gross, would entitle a party to relief in Chancery, on the ground of *gross mistake*. *Quesnel v. Woodlief*, 2 Hen. & Munf. 173, note; *Nelson v. Matthews*, 2 ib. 164; *Harrison v. Talbott*, 2 Dana, 258. In this last case, the series of Kentucky decisions on the subject are ably reviewed." See *Golden v. Maupin*, 2 J. J. Marsh. 230.

(1) If there be no fraud, the purchaser in a deed of land without covenant to secure the title, has no remedy for his money, even on failure of title, either at law or in equity. *Abbott v. Allen*, 2 John. Ch. 519; *Chesterman v. Gardner*, 5 John. Ch. 29; *Barkhamstead v. Case*, 5 Conn. 528; *Beele v. Seiveley*, 8 Leigh, 658; *Hershey v. Keemborts*, 6 Barr, 128. The objection if any, should be made before the acceptance of such a deed. *Miller v. Long*, 3 A. K. Marsh. 334; *Cradock v. Shirley*, ib. 288; *Barkhamstead v. Case*, 5 Conn. 528; *Morrison v. Caldwell*, 5 Monroe, 439; *Rawlins v. Timberlake*, 6 ib. 230; *Denston v. Morris*, 2 Edwards, 37.

(2) See *Quesnel v. Woodlief*, 6 Call, 218; S. C. 2 Hen. & Munf. 173 in note; *Hull v. Cunningham*, 1 Munf. 330; *Thomas v. Perry*, 1 Peters C. C. 49; *Nelson v. Matthews*, 2 Hen. & Munf. 164, and the remarks on these cases by Mr. Justice Story in *Stebbins v. Eddy*, 4 Mason, 419.

(3) See *Hoffman v. Johnson*, 1 Bland Ch. 109; *Joliffe v. Hite*, 1 Call, 262.

contents by actual admeasurement. It could not be contended that the terms "estimated" and "measured" had the same meaning. If a man was told that a piece of land was never measured, but was estimated to contain forty-one acres, would that representation be falsified by showing that, when measured, it did not contain the specified number of acres? The only contradiction to that proposition would be, that it had not been estimated to contain so much (*f*) (1).

7. The case of *Day v. Finn* (*g*), however, seems a considerable authority, that at least the words *more or less* ought only to clear a small deficiency where the contract rests *in fieri*. There, in ejectment, the plaintiff declared on a lease for years of a house *and thirty acres of land in *D*; and that *J. S.* did let to him the said messuage and thirty acres, by the name of his house in *B*, and ten acres of land there, *sive plus sive minus*: it was moved in arrest of judgment; because that thirty acres cannot pass by the name of ten acres, *sive plus sive minus*; and so the plaintiff had not conveyed to him thirty acres, for when ten acres are leased to him *sive plus sive minus*, these words ought to have a reasonable construction to pass a reasonable quantity, either more or less, and not twenty or thirty acres more. Yelverton agreed, for the word ten acres, *sive plus sive minus*, ought to be intended of a reasonable quantity, more or less, by a quarter of an acre, or two or three at most; but if it be three acres less than ten, the lessee must be contented with it. *Quod Fenner and Crook concesserunt*, and judgment was stayed.

8. And upon a motion in *Portman v. Mill* (*h*), it appeared that the lands were described as containing, by estimation, 349 acres, or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser at the quantity, whether more or less; and the actual number of statute acres was less by 100 acres than the number stated in the contract. Lord Eldon said, that as to this stipulation, he never could agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as was alleged to exist there. (2).

(*f*) *Winch v. Winchester*, 1 Ves. & Beam. 375; see as to goods, *Pettitt v. Mitchell*, 4 Mann. & Gra. 819. (*g*) *Owen*, 133; and see the cases cited above.

(*h*) 2 Russ. 570.

(1) See *Clark v. Bell*, 4 Dana, 115.

(2) See note, ante, 370.

9. But however the rule may be finally settled, yet a seller knowing the true quantity, would not be allowed to practise a fraud, by stating a false quantity, with the addition of the words "more or less," or the like (*i*) (1).

10. If an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents; while a particular statement of the quantity would naturally convey the notion of actual admeasurement: and therefore the Court would not be warranted in inferring that the purchaser knew the real quantity (*j*). For, if the purchaser did know the real quantity, of course he could not claim any allowance for the deficiency (2). So upon a sale of a house to the tenant *in possession*, a statement in *the particulars that the property was 46 feet in depth, when, in fact, the depth was only 33 feet, was held to entitle the purchaser to an abatement (*k*).

11. In a late case (*l*), the agreement was to sell an estate "containing the several quantities after mentioned, that is to say, by the plan drawn by Mr. F. in 1792;" the agreement then proceeded to state the numbers and particular quantities of *each close*, and then proceeded to add, "containing altogether *about* 101^a 3^r 29^p." There was a deficiency of 2^a in two closes which together were stated to contain 8^a 1^r 4^p. It was held that the purchaser was entitled to an abatement, as the quantity of each close was particularly specified.

12. The principle upon which an abatement in these cases is made, is, to place the parties in the situation in which they would have stood, if there had been no misrepresentation. Therefore, where a man purchased a wood, which was, by mistake, represented to contain nearly twenty-six acres more than it did, but the purchaser was, in the course of the negotiation, furnished with the value of the woods *qua* wood, so that he obtained the right quantity of wood but not of soil, the abatement was decreed to be only so

(*i*) See *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337; *supra*, p. 30, and 1 Ves. & Beam. 377.

(*j*) *Winch v. Winchester*, 1 Ves. & Beam. 375.

(*k*) *King v. Wilson*, 6 Beav. 124.

(*l*) *Gell v. Watson*, 16 Nov. 1825, MS.

(1) *Stebbins v. Eddy*, 4 Mason, 414. See *Pringle v. Samuel*, 1 Litt. 44; *Duvals v. Ross*, 2 Munf. 290.

(2) See *Craddock v. Shirley*, 3 A. K. Marsh. 283.

much as soil covered with wood would be worth, after deducting the value of the wood (*m*).

13. In *Price v. North* (*n*), where the estate was described as seven fields 14^a more or less, with the usual condition, that mistakes in description should not annul the sale, but be the subject of compensation, it appeared that the acres were customary ones, and were equal to 27 statute acres; the Lord Chief Baron observed, that he knew that courts of equity had gone a great way in allowing contracts of this nature to be altered on the ground of misdescription; but he owned it appeared to him, that such a misdescription as this would not be ground for modifying the contract, but for avoiding it altogether. This observation was made upon a petition against the purchaser, and no doubt it would be difficult in such a case to make a *bona fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it, but he could doubtless enforce the contract upon payment of the additional price. The vendor alone was in fault.

14. Where lands are shown to a purchaser as part of his purchase, he will be entitled to them, although expressly excepted in *his conveyance by name, provided he did not know them by that name (*o*).

15. So if a man purchase an estate by a particular, and in the conveyance part of the land is left out, equity will relieve him (*p*); but it must be clear that he did purchase by the particular, because it is not a writing within the statute of frauds; and, therefore, unless that be the case, or the agreement can be otherwise proved, the Court cannot relieve (*q*).

16. On the other hand, the Court will equally relieve a vendor, where more land has passed than was contracted for; although in an early case (*r*) (I) this relief was denied; because the defendant was a purchaser upon valuable consideration. But it is now clear, that if land be expressly conveyed, or pass by general words, which was not mentioned in the particular by which the purchase

(*m*) *Hill v. Buckley*, 17 Ves. jun. 394.

(*n*) 2 You. & Coll. 620.

(*o*) *Oxwick v. Brockett*, 1 Eq. Ca. Abr. 355, pl. 5.

(*p*) *Prec. Cha.* 307, *arguendo*: and see

Nelson v. Nelson, Nels. Cha. Rep. 7.

(*q*) *Cass v. Waterhouse*, *Prec. Cha.* 29.

See *Clinan v. Cooke*, 1 Sch. & Lef. 22; and see ch. 3, *supra*; and 2 Dow. 301.

(*r*) *Clifford v. Laughton*, *Toth.* 83.

(I) Probably the defendant had purchased without notice from the *first* purchaser.

was made, or was not intended to be conveyed, the purchaser will be decreed to re-convey it (*s*) (1).

17. And where a purchaser took a conveyance of an estate from his own instructions, he was held not to be entitled to land answering the general description in the advertisements of sale, but which was not included in his conveyance, nor in a more particular description from which he prepared his instructions (*t*) (2).

18. We may here observe, that old general or vague descriptions, particularly in the case of copyholds, will in most cases be held to pass the lands which have regularly been held under them (*u*).

19. To come to a right conclusion on this branch of our subject, we must be informed that an acre does not always contain the same superficial quantity of land. The word acre at first denoted, not a determined quantity of land, but any open ground or field. It afterwards signified a measured portion of land, but the quantity varied, and was not fixed until the statute (*I*) *de terris mensurandis* (*x*), according to which an acre contains one hundred *and sixty square perches; so that every acre is a superficies of forty perches long, and four broad; or in that proportion, be the length or breadth more or less. The length of the perch was, previously to the statute of Edward, fixed at five yards and a half, or sixteen feet and a half, by the statute called *compositio ulnarum et perticarum* (*y*), and the act of Edward must of course be construed with reference to this standard. Lord Kenyon seems to have thought it impossible to contend, that a custom should prevail that

(*s*) *Tyler v. Beversham*, Rep. temp. Finch, 80; 2 Ch. Ca. 195. See *Gibson v. Smith*, Barnard, Ch. Ca. 491.

(*t*) *Calverley v. Williams*, 1 Ves. jun. 210.

(*u*) See *Long v. Collier*, 4 Russ. 267.

(*x*) 33 Edw. I.; and see 24 H. VIII. c. 4; 2 Inst. 737; Co. Litt. 69 a; Spelm.

Gloss. *v. Aera, particata, terra, pertica, pes forestae, roda terra*. Cow. Interp. *v.*

Acre.

(*y*) See 4 Inst. 274.

(*I*) It was formerly holden not to be a statute, but only an ordinance. *Stowe's case*, Cro. Jac. 603; but this has since been overruled. *Rex v. Everard*, 1 Lord Raym. 638.

(1) See *Gilmore v. Morgan*, 2 J. J. Marsh. 65; *Smith v. Smith*, 4 Bibb, 81; *Bowles v. Craig*, 8 Cranch, 371; *Harrison v. Talbott*, 2 Dana, 268; *Rogers v. Garnett*, 4 Monroe, 271. Where there was so great a surplus of land; namely, eight hundred and seventy-six acres, in a patent for fifteen hundred and thirty-three and one-third acres; beyond what the patent called for nominally, as that it could hardly be presumed to have been within the view of either of the parties, the court decreed a conveyance of the surplus; the vendee to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same. *King v. Hamilton*, 1 Peters, (S. C.) 311. See *Hundley v. Lyons*, 5 Munf. 342; *Ascam v. Smith*, 2 Penn. 211.

(2) See *Morss v. Elmendorf*, 11 Paige, 277.

a less space of ground than an acre should be called an acre (*z*) ; but in several places the perch is measured with rods of different lengths, and notwithstanding Lord Kenyon's *dictum*, *consuetudo loci est observanda* (*a*), so that a greater or less space of ground than a statute acre may, in compliance with the custom of the place where the land lies, be called an acre. In some places the perch is measured by a rod of twenty-four feet, in some by one of twenty feet (*b*), and in others by one of sixteen feet (*c*). And we are now to inquire in what cases the custom of the country in this respect shall or shall not prevail (*d*).

20. In adversary writs the number of acres are accounted according to the statute measure (*e*), but in fines, and common recoveries, which were had by agreement and consent of parties, the acres of land are according to the customary and usual measure of the country, and not according to the statute (*f*).

21. So, which is more to our present purpose, where a man agrees to convey (*g*), or actually conveys (*h*) any given number of acres of land, which are known by estimations or limits, there the acres shall be taken according to the estimation of the country where the land lies, be they more or less than the measure limited by the statute ; for they pass as they are there known, and not according to the measure by statute (*i*) (1).

*22. But if a man possessed of a close containing twenty acres of land by estimation, which is not eighteen, grant ten acres of the same land to another, there the grantee shall have ten acres according to the measure fixed by the statute, because the acres of such a close are not known by parcels, or metes and bounds, and so this case differs from the one immediately preceding it (*j*). And it is said, that if one sells land, and is obliged that it contain twenty

(*z*) Noble v. Durell, 3 T. Rep. 271 ; and see Hoekin v. Cooke, 4 T. Rep. 314 ; Master of St. Cross v. Lord Howard de Walden, 6 T. Rep. 338.

(*a*) 6 Rep. 67 a.

(*b*) Crompt. on Courts, 222, who cites a case in the Exchequer, related to him by one of the Barons ; and also 47 E. III. [fo. 18 a, pl. 35 ;] and see Barksdale v. Morgan, 4 Mod. 185.

(*c*) Co. Litt. 3 b. See Dalt. c. 112. s. 25.

(*d*) *Infra*, pl. 23.

(*e*) Andrew's case, Cro. Eliz. 476,

cited.

(*f*) Sir John Bruyn's case, 6 Co. 67 a, cited ; Waddy v. Newton, 8 Mod. 276. See Floyd v. Bethill, 1 Roll. Rep. 420, pl. 8 ; and see Treswallen v. Penhules, 2 Rolle's Rep. 66 ; 12 Vin. 240.

(*g*) Some v. Taylor, Cro. Eliz. 665.

(*h*) 47 E. III. 18 a, pl. 35 ; 6 Co. 67 a ; Morgan v. Tedcastle, Poph. 55 ; Floyd v. Bethill, 1 Rolle's Rep. 420, pl. 8 ; Andrew's case, Cro. Eliz. 476, cited.

(*i*) *Infra*, pl. 23.

(*j*) Morgan v. Tedcastle, Poph. 55.

(1) See Price v. North, 2 Y. & Coll. 620.

acres, the acres shall be taken according to the law, and not according to the custom of the country (*k*).

23. But the law upon this subject is altered by an Act of the 5th of Geo. 4th, intituled, "An Act for ascertaining and establishing Uniformity of Weights and Measures," which provides, that (*l*) the straight line or distance between the centres of the two points in the gold studs in the straight brass rod now in the custody of the clerk of the House of Commons, whereon the words and figures, "standard yard, 1760," are engraved, shall be the original and genuine standard of that measure of length or lineal extension called a yard; and that all measures of length shall be taken in parts or multiples, or certain proportions of the said standard yard; and that one third part of the said standard yard shall be a foot, and the twelfth part of such foot shall be an inch; *and that the pole or perch in length shall contain five such yards and a half*, and it enacts, that (*m*) all superficial measure shall be computed and ascertained by the said standard yard, or by certain parts, multiples or proportions thereof; and that the rood of land shall contain 1,210 square yards according to the said standard yard; and that the acre of land shall contain 4,840 such square yards, being 160 square perches, poles or rods (*n*).

24. And it enacts (*o*), that from the first day of May 1825, all contracts, bargains, sales and dealings which shall be made or had within any part of the United Kingdom of Great Britain and Ireland, for any goods, wares, merchandise, or other thing to be sold, delivered, done or agreed for *by measure*, where no special agreement shall be made to the contrary, shall be deemed, taken and construed to be made and had according to the standard measures ascertained by this Act; and in all cases where any special agreement shall be made with reference to any measure established by local custom, the ratio or proportion which every such local measure *shall bear to any of the said standard measures shall be expressed, declared and specified in such agreement, or otherwise such agreement shall be null and void. And it is enacted that (*p*) the several statutes, ordinances, and acts and parts of the several statutes, ordinances and acts thereafter mentioned and specified, so far as the same relate to the ascertaining or establishing any standards of measures, or to the establishing or recognizing certain differences between

(*k*) Wing v. Earle, Cro. Eliz. 267.

(*l*) Sect. 1, c. 74.

(*m*) Sect. 2.

(*p*) Sect. 15. See 5 & 6 Will. 4, c. 63, s. 3.

(*o*) Sect. 15.

(*p*) Sect. 23, see 6 Geo. 4, c. 12.

measures of the same denomination, shall from and after the 1st day of May 1825, be repealed; and the enumeration includes the statutes or ordinances before mentioned in this section, which are therefore repealed. But by a later act, local or customary measures are abolished (*q*), and so much of the act of George the 4th is repealed as allows the use of weights or measures not in conformity with the imperial standard, or allows *goods or merchandise* to be bought or sold by any weights or measures established by local custom, or founded on special agreement (*r*).

25. The Act of Geo. 4th determines what now in law is the superficial quantity of an acre of land. A question will no doubt arise, whether s. 15 applies to contracts for land under the words "or other thing to be sold," or whether those words are not to be construed *ejusdem generis* with the preceding words, which are "goods, wares, merchandise." At all events, the section applies only to sales *by measure*. But wherever a purchaser is under a contract entitled to statute acres, the measure will be regulated by this Act (*s*).

(*q*) 5 & 6 Will. 4, c. 63, s. 6.

(*r*) Id. s. 3.

(*s*) See and consider 5 & 6 Will. 4, c.

63, s. 3. and 6 in connexion with s. 15 of 5 Geo. 4, c. 74.

*SECTION IV.

OF DEFECTS IN THE QUALITY OF THE ESTATE.

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| 2, 21. <i>Caveat emptor.</i> | 19. <i>Statement of annual produce of</i> |
| 3. <i>Right of way not stated.</i> | <i>woods.</i> |
| 4. <i>Uncommonly rich water meadow.</i> | 22. <i>Error for and against the seller.</i> |
| 5. <i>Residence for a respectable family.</i> | 23. <i>Repairs not subject of compensation</i> |
| 6. <i>House in different county.</i> | <i>when possession required.</i> |
| 7. <i>Where house will not answer for purpose intended.</i> | 24. <i>Cutting down ornamental timber after contract.</i> |
| 8. <i>Opinions on Shirley v. Davis.</i> | 27. <i>Latent defect which purchaser cannot discover.</i> |
| 11. <i>False description of locality.</i> | 28. <i>Lord Kenyon's opinion although estate sold with all faults.</i> |
| 12. <i>Of state of repair.</i> | 29. <i>Lord Ellenborough's opinion.</i> |
| 13. <i>Notice to repair not disclosed.</i> | 30. <i>Sir James Mansfield.</i> |
| 15. <i>Where purchaser knows the description is false.</i> | |

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| 31. <i>Mr. Justice Heath's and Mr. Justice Gibbs'.</i>
32. <i>Observations on the rule.</i>
34. <i>The Scienter.</i> | 35. <i>In the case of title.</i>
37. <i>Concealment of defect.</i>
39. <i>Purchaser waiving his right.</i> |
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1. WE have under a preceding head anticipated questions arising upon rights of sporting, of common, or the like, to which we must now refer (a).

2. In most cases on this head, the rule "*caveat emptor*" applies, and therefore, although there be defects in the estate, yet, if they are patent, the purchaser can have no relief (b) (1).

3. Thus, where a meadow was sold to the owner of a house and ground adjoining without any notice of a foot-way round it, and also one across it, which of course lessened its value, Lord Rosslyn decreed a specific performance with costs, as *he could not*, he said *help the purchaser who did not choose to inquire* (c). *It was not a latent defect.* Lord Manners has said, that he believed the bar was not very well satisfied with the decision, although, as he observed, the purchaser was undoubtedly extremely negligent not to look at the estate before he purchased it (d). Had he used ordinary caution, he would have discovered the easement.

*4. So a description, that the land was uncommonly rich water meadow, was held to be immaterial, although the property was imperfectly watered. The Court thought that it would be straining the meaning of the words "uncommonly rich water meadow land," if it were not confined to the quality of the land: and in that sense it professed to be nothing more than the loose opinion of the auctioneer or vendor as to the obvious quality of the land, upon which the vendee ought not to have placed, and could not be considered to have placed, any reliance (e) (2).

(a) *Supra*, s. 1; and see ch. 1, s. 3, pl. 23—42.

(b) See the introductory Chapter; and see *Lowndes v. Lane*, 2 Cox, 363.

(c) *Oldfield v. Round*, 5 Ves. jun. 508.

(d) 1 Ball & Beatty, 250; and see *Legge v. Croker*, *ib.* 506.

(e) *Scott v. Hanson*, 1 Sim. 13; vide *supra*, p. 3.

(1) See Chitty Contr. (8th Am. ed.) 390 and notes; *Sherwood v. Salmon*, 5 Day, 439; S. P. 2 Day, 128; 2 Kent (6th ed.) 478, 479; 1 Story Eq. Jur. §212; ante, 370, note.

(2) *Hutchinson v. Brown*, 1 Clarke, 408; 1 Story Eq. Jur. §199 to §202. The vendee must guard himself against the vendor's strong representations and commendations of the good qualities of the land sold, by personal examination and inquiry, unless such examination and inquiry are difficult or are prevented by the artifice of the vendor. *Taylor v. Fleet*, 4 Barbour, 102, Per Strong J.; *Dugan v. Carlton*, 1 Arkansas, 31.

5. So where a house was represented as a residence fit for a respectable family, the Court said the purchaser might see the house and judge for himself, and he could not complain when ordinary diligence would have enabled him to make sure (1). Therefore, if the house appeared in fact not to be such as we should understand by that description, nothing could be made of that. That was merely puff (*f*).

6. And here a case (*g*) may be introduced, where the subject of the contract was a house on the north side of the river Thames, supposed to be in the county of Essex, but which turned out to be in Kent; a small part of which county happens to be on the other side of the river. The purchaser was told he would be made a churchwarden of Greenwich, when his object was to be a freeholder of Essex; yet he was compelled to take the house.

7. This decision, however, seems to be opposed by a case before Lord Talbot. An agreement was entered into for the purchase of a house for a coffee-house. It was found that a chimney could not be made convenient for a coffee-house; but nevertheless, the vendor filed a bill against the purchaser, to compel him to perform the agreement. Lord Talbot dismissed the bill, merely because the tenant would be obliged to take it for a purpose he did not want (*h*) (2).

8. The case, indeed, of *Shirley v. Davis*, and the cases of that class have constantly been disapproved of. In one case it was observed by the Court, that the principle was, that if substantially the purchaser can have the thing contracted for, a slight variation in the qualification of it will not disable the vendor from having a decree for specific performance, when compensation can be made pecuniarily for the difference. This was the sole principle on which the Court assumed jurisdiction to permit deviation in any degree from the strict right to have exactly the precise thing agreed for. There had been some very wild cases—*Shirley v.*

(*f*) *Magennis v. Fallon*, 2 Moll. 561.

(*h*) 1 Russ. & Myl. 128; 1 Ves. 307;

(*g*) *Shirley v. Davies*, in the Exchequer, 6 Ves. jun. 678, cited. and see 13 Ves. jun. 78.

(1) The vendee will be held to have known what by reasonable diligence he could have known. *Taylor v. Fleet*, 4 Barbour, 108.

(2) Where land was sold for building lots, and bounded on a street sixty-six feet wide, the sale was set aside because the street was in fact only eleven feet wide and thus very much diminishing the value of the land. *Stewart v. Andrews*, cited and stated in *Taylor v. Fleet*, 4 Barbour Sup. Ct. Rep. 105. See where the lots conveyed had been dedicated as public street. *Champlin v. Layton*, 1 Edwards, 171; 6 Paige, 189.

Davis—animadverted on by Lord Eldon more than once, the tithe free land case, especially the house and wharf case, and the case of the manor with the right of shooting (I). But those cases were not to be followed. There was, the Court added, no case which was of authority deciding that in case of a contract for a peculiar object, having in the eye of the purchaser a particular value, from circumstances not capable of pecuniary compensation, the purchaser could be compelled to perform it if these be taken away (i) (1).

9. But it may be remarked, that it is no bar to a specific performance, that the conveyance will not have the operation which the purchaser thought it would. Thus, where a tenant for life of a copyhold purchased the reversion in the hope of extinguishing contingent remainders, and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the security which he had given for the purchase-money; the Court gave him his option either to pay the principal, interest, and costs, or to have his bill dismissed with costs (k).

10. So, in a case where, under the *legal construction* of the terms of an agreement for a lease, the option to determine the lease was in the lessee only, and it was argued against a specific performance, that this was contrary to the intention, the Master of the Rolls said that a specific performance of a written agreement cannot be denied because the meaning of the parties does not appear (l).

11. But where a vendor gives a false description of the estate, the purchaser may at law rescind the contract, (2) although it be provided that errors of description shall not vitiate the sale. As where before the Reform Act an estate was stated to be but one mile from a borough town, and it turned out to be between three and four, the contract was held to be voidable by the purchaser (m). And of course the same rule would prevail in equity.

12. So in a case where the estate was described to have lately

(i) *Magennis v. Fallon*, 2 Moll. 588, 589, *per* Hart, L. C.

(k) *Mildmay v. Hungerford*, 2 Vern. 243.

(l) *Price v. Dyer*, MS., Rolls; S. C. 17 Ves. jun. 356.

(m) *Duke of Norfolk v. Worthy*, 1 Camp. Ca. 337; *vide supra*, p. 30; and see *Fenton v. Browne*, 14 Ves. jun. 144; — *v. Christie*, 1 Salk. 28, *by* Evans; *Trower v. Newcombe*, 3 Mer. 704.

(1) This probably is an inaccurate reference to *Burnell v. Brown*, *supra*, p. 352.

(2) See *Taylor v. Fleet*, 4 Barbour, 102.

(2) See *Pringle v. Samuel*, 1 Litt. 46; *Bostwick v. Lewis*, 1 Day, 33, 250; *Norton v. Hathaway*, 1 Day, 255.

undergone a thorough repair, whereas it was in a complete state of *ruin, and ordered to be pulled down by the district surveyor, the purchaser was allowed to rescind the contract (*n*). And where the state of the house was not perfectly visible to every body, and the state of the repairs was falsely represented by the seller, knowing that the house had the dry-rot, without communicating that fact to the purchaser, who relied so much on the seller that he had not had the premises surveyed; upon a bill filed by the seller, a specific performance was decreed, but with a compensation to the purchaser (*o*), with which he was willing to complete the contract.

13. So where the purchaser of a leasehold house was aware of the ruinous state of the premises, but no mention was made at the sale by auction of a notice to repair given to the vendor by the lessor, on the day before the sale, under which the lessor re-entered and evicted the purchaser, he (the purchaser) was permitted to recover the deposit from the auctioneer, on the ground that in such transactions good faith was most essential, and the vendor or his agent was bound to communicate to the vendee the fact of such notice (*p*).

14. But if the purchaser knew that the description was false, he cannot, it seems, take advantage of it either at law or in equity (*1*).

15. Thus, in a case (*q*) where an estate was described as being within a ring fence, it appeared, that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate; Sir William Grant (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other lands), said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased; he had lived in the neighborhood all his life. This variance was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground,

(*n*) *Loyes v. Rutherford*, K. B. 16 May 1809.

(*o*) *Grant v. Munt*, Coop. 173; the evidence hardly warranted the decree, but

an issue as to the fact of the representations was declined.

(*p*) *Stevens v. Adamson*, 2 Stark. 422.

(*q*) *Dyer v. Hargrave*, 10 Ves. jun. 505. See and consider 8 Cl. & Fin. 792.

(1) 1 Story Eq. Jur. §202.

that the purchaser could not get rid of the contract on account of the difference in the description of the farm, he determined that he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance ; for if he had knowledge *that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less.

16. This case, we observe, went a step farther than either the case before the Court of Exchequer, or that before Lord Rosslyn, in neither of which was there any warranty or false description. But in this case it was expressly stated, that the whole estate was within a ring fence ; but the Master of the Rolls thought that circumstance immaterial, as the purchaser knew the description was false ; and the decision appears to have been grounded on the doctrine, that even at law a warranty is not binding where the defect is obvious, and the learned Judge put the cases of a horse with a visible defect, and a house without a roof or windows warranted as in perfect repair ; and in another case, where there was a representation as to the state of repair, he said that as to warranty, if the defect was patent or obvious, the warranty would not bind (r) (1).

17. But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract.

18. Thus, in the case before the Master of the Rolls, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared, however, that the house was not in good repair, and that the land was not in a high state of cultivation. The learned Judge said, that the objections were such as a man might have an indistinct knowledge of, and he might have some apprehension that, in those respects, the premises did not completely correspond with the description, and yet the description might not be so completely destroyed as to produce any great difference in his offer. As to the marsh land, it was very uncertain, whether, by any view, it was possible for him to judge of that. It was stated by many witnesses, that the season of the year was just at the breaking of

(r) *Grant v. Munt*, Coop. 173.

(1) See 2 Kent (6th ed.) 484 ; *Schuyler v. Russ*, 2 Caines Rep. 202 ; *Chitty Contr.* (8th Am. ed.) 396 and notes.

a frost, and represented that no man could, at that time, say whether the land was well or ill cultivated. So he might have seen some trifling defects in the house, and might not intend to make the objection, if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards, when he came to examine, he discovered *that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case where, by minute examination, the discovery could be made. The purchaser was induced to make a less accurate examination by the representation, which he had a right to believe. He therefore was entitled to compensation for the defects of the house, and the cultivation of the marsh land.

19. In a case where the woods were represented as actually producing 250*l.* per annum, on an average of the fifteen preceding years; but the manner of making the calculation was explained at the sale, and it seems a paper was exhibited, which showed that the woods had not been equally cut, and the purchaser sent his own surveyors down, and they thought that the woods had been cut in an improper manner, Lord Thurlow refused the purchaser any compensation although the representation was not correct, for the communications to him put it on him to consider whether the manner of calculation was a proper one to ascertain the *permanent* income, and as he was apprised by his surveyors that the woods had not been regularly cut, with that knowledge it fell on him to take care of himself (*s*).

20. But if the representation had been made generally, and it had been distinctly proved that this part, though literally true, yet was made by racking the woods beyond the course of husbandry, that would have been a fraud in the representation which Lord Thurlow said might have been relieved against (*t*).

21. Lord Thurlow, in the above case, said that, as to the extent of the maxim, *caveat emptor*, he was willing to carry it to a great extent, but not to the extent of saying it should apply where there was a positive representation essentially material to the subject sold, and which at the same time is false in fact. He said he must

(*s*) Lowndes v. Lane, 2 Cox. 363.

(*t*) S. C.

consider any fundamental mistake in the particulars of an estate as furnishing a case in which the purchaser would be entitled to have the mistake set right if recently applied for (1).

22. Where trustees for sale of a manor, stated *generally* in the particulars that the fines were arbitrary, which was not correct, but added that the clear profits on an average of eight years had been 150*l.* a year, whilst they really exceeded 200*l.* a year; it was held that the purchaser was not entitled to any compensation, although *there was the usual condition providing compensation in case of error or misstatement (u).

23. Notwithstanding that the case of *Dyer v. Hargreave* has established that the repairs necessary to a house are a subject of compensation, although the house is described to be in good repair, yet the Court seemed to admit, that if the purchaser wanted possession of the house to live in at a given period, by which time the repairs could not be completed, he ought not to be bound to complete the contract (v).

24. Where a house was represented in the advertisements as fit for the residence of a family, and the demesne well wooded, and at the time of the sale a map of the estate was exhibited upon which several clumps and single trees were delineated, although nothing was said about ornamental timber, and after the sale, and pending the investigation of title, some of the ornamental timber exhibited on the map was cut down, the purchaser was relieved from the contract. The Court said, that there was now no case, which was of authority, deciding that in case of a contract for a peculiar object, having in the eye of the purchaser a particular value, from circumstances not capable of pecuniary compensation, where the purchaser can be compelled to perform it, if these be taken away. The house was represented as surrounded by ornamental timber, constituting a feature of beauty, and a purchaser could not replace the timber. The Court could not go into the question of despoliation of ornament; the destruction of one beautiful tree would be sufficient, and it did not admit of pecuniary compensation. The adventitious value was taken away, and there was no instance of

(u) *White v. Cuddon*, 8 Cl. & Fin. 766. (v) *Vide supra*, ch. 5.

(1) If a vendor of land, knowing that the purchaser is unacquainted with its situation or value, makes a false representation as to any matter, which if true, would materially enhance the value of the property, he is, in equity, bound to make his representation good. *Bradley v. Bosley*, 1 Barbour Ch. Rep. 125; *Parham v. Randolph*, 1 Howard (Miss.) 135.

a court of equity under such circumstances compelling a purchaser—contracting for the purchase of a house and demesne fit for residence, and embellished with ornamental timber, where ornamental trees have been cut down between the contract and possession given, or title shown—to complete the purchase (*x*).

25. This case proves that a purchaser is entitled to the subject as described, and that the alteration of it after the contract, and before the completion of the contract, in a subject which admits not of compensation, avoids the contract as against the purchaser.

26. But where ordinary timber is cut down after the contract, that may be a subject of compensation (*y*).

27. Where the defect is a *latent* one, and the purchaser cannot by the greatest attention discover it, if the vendor be aware of it, and do not acquaint the purchaser with the fact, he may set aside *the contract at law, although he bought the estate *with all faults* (*z*) (1); and equity would not enforce a specific performance.

28. This was decided at law by Lord Kenyon at *nisi prius*, upon the sale of a ship. It was insisted, for the seller, that the rule *caveat emptor* applied; but Lord Kenyon said, that there are certain moral duties, which philosophers have called duties of imperfect obligation, such as benevolence to the poor, and many others, which courts of law do not enforce. But in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith. This was a latent defect, which the plaintiffs could not, *by any attention whatever, possibly discover*; and which the defendants knowing of, ought to have disclosed to the plaintiffs. The terms to which the plaintiffs acceded, of taking the ship with all faults, and without warranty, must be understood to relate only to those faults which the plaintiffs could have discovered, or which the defendants were unacquainted with.

29. In a late case (*a*), the same point arose before Lord Ellenborough at *nisi prius*; but ultimately it was not necessary to decide it. Lord Kenyon's decision was cited. Lord Ellenborough said, that he could not subscribe to the doctrine of that case, although he felt the greatest respect for the authority of the Judge by whom it was decided. Where an article is sold *with all faults*,

(*x*) *Magennis v. Fallon*, 2 Moll. 588.

(*y*) *S. C.*

(*z*) *Mellish v. Motteux*, Peake's Ca. 115.

(*a*) *Baglehole v. Walters*, 3 Camp. Ca.

154. See 1 Ball & Beatty, 515; *Early v. Garrett*, 9 Barn. & Cress. 928; 4 Man. & Ryl. 687; *Bywater v. Richardson*, 1 Adol. & Ell. 508.

(1) See *Chitty Contr.* (8th Am. ed.) 396.

he (Lord Ellenborough) thought it was quite immaterial how many belonged to it within the knowledge of the seller, *unless he used some artifice to disguise them, and to prevent their being discovered by the purchaser.* The very object of introducing such a stipulation is, to put the purchaser on his guard, and to throw upon him the burthen of examining all faults, both secret and apparent. A man may be possessed of a horse he knows to have many faults, and wish to get rid of him, for whatever sum he would fetch. He desires his servant to dispose of him; and instead of giving a warranty of soundness, to sell him *with all faults*. Having thus laboriously freed himself from responsibility, is he to be liable, if it be afterwards discovered that the horse was unsound? Why did not the purchaser examine him in the market when exposed to sale? By acceding to buy the horse with all faults, he takes upon himself the risk of latent or secret faults, and calculates accordingly the price which he gives. It would be most inconvenient and unjust if men could not, by using the strongest terms which language affords, obviate disputes concerning the quality *of the goods which they sell. In a contract such as this, he thought there was no fraud, unless the seller, by positive means, renders it impossible for the purchaser to detect latent faults; and he made no doubt, that this would be held as law when the question should come to be deliberately discussed in any court of justice.

30. In a still later case, upon the sale of a ship, the particular stated, amongst other things, that the hull was nearly as good as when launched. And after stating where she was to be seen, added, “with all faults as they now lie.” Then followed an inventory of the stores, to which the following declaration was added, “the vessel and her stores to be taken with all faults as they now lie, without any allowance for weight, length, quality, *or any defect whatsoever.*” The ship was quite unseaworthy. She belonged to underwriters to whom she had been abandoned. The agents for the sale must have known her defects, *and she was kept constantly afloat, so that her defects could not be discovered.* The person who framed the particular had not examined the vessel (b). Mansfield, C. J., said that these words were very large, to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale,

(b) *Schneider v. Heath*, 3 Camp. Ca. 506.

these words would not protect him. There might be such fraud either in a false representation, or in using means to conceal such defect. He thought the particular was evidence here by way of representation, that stated the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, was this true or false? If false, it was a fraud, which vitiated the contract. What was the fact? The hull was worm-eaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent says, that he framed this particular without knowing anything of the matter. But it signified nothing whether a man represented a thing to be different from what he knew it to be, or whether he made a representation which he did not know at the time to be true or false, if, in point of fact, it turns out to be false (c) (1). But, besides this, it appeared here that means were taken fraudulently to conceal the defects in the ship's bottom. These must have been known to the captain, who was to be considered the agent of the owners, and he evidently, to prevent their being discovered by persons disposed to bid for her, removed her from the ways where she lay dry, and kept her afloat in the dock till the sale was over. Therefore, consistently *with the decided cases upon this subject, the learned Judge was of opinion, that the purchaser was entitled to recover back his deposit.

31. In a case which occurred a few months before, upon the sale of a ship, where the Court held that, in point of fact, there was no fraud, Mr. Justice Heath said, that the meaning of selling "with all faults" is, that the purchaser shall make use of his eyes and understanding to discover what faults there are. He admitted that *the vendor was not to make use of any fraud or practice to conceal faults*. The learned Judge adhered to the doctrine of Lord Ellenborough, above stated, without any difficulty. Mr. Justice Chambre held, there must be evidence of fraud to enable the Court to depart from the written agreement. Mr. Justice Gibbs agreed with Lord Ellenborough's doctrine. Even if there had been a representation it would not have availed. He held, that if a man brought him a horse, and made any representation whatever of his quality and soundness, and afterwards they agreed in writing for the purchase of the horse, that shortened and corrected the repre-

(c) Vide *supra*, ch. 4, s. 5, pl. 25, 26.

(1) *Stone v. Denny*, 4 Metcalf, 151; *Hammatt v. Emerson*, 27 Maine, 308; *Hazard v. Irwin*, 18 Pick. 95.

sentations, and whatsoever terms were not contained in the contract would not bind the seller. But the learned Judge agreed that *fraud* would not be done away by the contract (*d*).

32. It appears therefore to be settled that the condition "with all faults," excuses the seller from stating those within his knowledge, but he must not use any artifice to conceal them from the purchaser. Now this, which is quite right, seems hardly to meet the case before Lord Kenyon, where the seller knew of the defect and did not disclose it, although he also knew that the purchaser could not by any attention whatever possibly discover it. In such a case, no artifice need be resorted to by the seller to conceal the defect from the purchaser, and yet the man who sells such a subject with all its faults without disclosing the concealed one, seems only, in a moral view, on a level with him who, making a similar sale of a subject where a defect might by diligence be discovered, resorts to artifice to prevent the purchaser from coming to the knowledge of it. The question is not of more or less of turpitude, but whether in either case a fraud has not been committed. The rule is not that the seller may use his skill to conceal, and that the purchaser is to exercise his to discover the defects. The distinction therefore is but a thin one between a man who has plastered over a rent in the main wall and papered it over, and then sells, subject to all faults, knowing that the purchaser cannot *discover this fatal one which he does not point out, and a man who, knowing that the defect is thus concealed, sells the estate with all its faults without disclosing this, which he knows cannot be discovered : in either case the purchaser is deceived. In the first case, no doubt, the seller by his act hides the defect, but there is no positive fraud in hiding the defect ; the fraud is committed, or at least consummated, when the seller by his silence induces the purchaser to buy without the means of knowledge. Now in this respect, the sellers in the two cases are upon a par, for each is aware that the defect is hid, and each is silent. Can it, in point of honesty, matter that the one covered the defect and that the other only knew that it had been covered ?

33. But where even the estate is sold generally and not subject to all faults, the ground and basis of an action in the case of this nature, for recovery of a deposit, where the contract is *in fieri* ; or of damages, where the contract is actually executed, is the *scienter* ;

(*d*) *Pickering v. Dowson*, 4 Taunt. 779. See *Jones v. Bowden*, *ib.* 847 ; *Shepherd v. Kain*, 5 Barn. & Ald. 240 ; *Freeman v. Baker*, 5 Barn. & Adol. 797.

and, therefore, if the vendor was not aware of the defect, he will not be answerable for it. Nor will trifling defects be sufficient foundation for such an action.

34. Thus, in a case (*e*) where a purchaser brought an action against a vendor, to recover damages for having sold him a house, knowing it had the dry-rot (*f*); it appeared, that the house was situated in a clayey soil, and that the floor lay near the ground, by which some of the timbers had rotted; but the vendor was not aware of the defects, and the purchaser was nonsuited. Lord Kenyon said, the circumstances that had been proved in this case might be described by a word that was used by one of the witnesses; they were mere *bagatelles*. If these small circumstances were to be the foundation of an action, every house that was sold would produce an action. If a broken pane of glass that might be found in a garret window, perhaps, had not been described by the seller, it would be the ground of an action. If he was to consider himself as a witness in the cause, he could say he had met with something of this kind, and he never thought himself imposed upon, because now and then some rotten boards and rotten joists might be found about a house. Besides, there was no imposition, no *mala fides* in this case.

35. And of course the same rule prevails where the question turns upon title, and the estate is agreed to be sold with all defects of title. Where, therefore, a leasehold estate, for which rent had been paid, had been sold by the lessee as a fee simple, which fee *simple afterwards became vested in assignees of a bankrupt, who contracted to sell the estate to a person who agreed to accept a conveyance of such right or title as might be theirs, with all faults and defects, if any, and the purchase-money was paid, and afterwards the lessor recovered the property; the purchaser, before the execution of the agreement, asked the sellers whether any rent had ever been paid, and they replied, that no rent had ever been paid by the bankrupt or any person under whom he claimed; and the jury having found that the sellers believed their representation to be true, the purchaser, it was held, had no right to recover the purchase-money; for the concealment must be fraudulent, and the statement, though false, was not fraudulent (*g*).

36. Although the purchaser might, with proper precaution, have

(*e*) *Bowles v. Atkinson*, N. P. MS.; and see *Legge v. Croker*, 1 Ball & Beat. 506.

(*f*) See *Grant v. Munt*, Coop. 173, *supra*, p. 380.

(*g*) *Early v. Garret*, 9 Barn. & Cress. 928; 4 Man. & Ry1. 687, *post*, ch. 12, s. 2.

discovered the defect; yet if, during the treaty, the vendor *industriously* conceal the fact, equity will not assist him (1).

37. Thus, upon a suit for a specific performance, the defence was, that the estate was represented to the defendant as clearing a net value of 90*l.* per annum, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an out-going of 50*l.* per annum. And it appearing, upon evidence, that there had been an *industrious concealment* of the circumstances of the wall during the treaty, the Lord Chancellor dismissed the bill, but without costs (h).

38. So where, upon the sale of a house, the seller being conscious of a defect in a main wall, plastered it up and papered it over, it was held that, as the seller had actually concealed it, the purchaser might recover (i).

39. We may close this section by observing, that if a purchaser having a right to rescind a sale upon the ground of fraudulent representations, continue to deal with the subject of the sale as owner after he is aware of the fraud, he will be held to have waived his right of action (k).

(h) *Shirley v. Stratton*, 1 Bro. C. C. 440. [Perkins's ed. notes.]

(i) 4 Taunt. 785, cited by Gibbs, J.

(k) *Campbell v. Fleming*, 1 Adol. & Ell. 40.

(1) See *Taylor v. Fleet*, 4 Barbour Sup. Ct. Rep. 102.

*CHAPTER VIII.

OF AGREEMENTS TO ACCEPT A TITLE, AND OF WAIVING OBJECTIONS TO TITLE, AND OF THE REMEDIES WHERE THE TITLE IS IN DISPUTE.

SECTION I.

OF AGREEMENTS TO ACCEPT A TITLE, AND OF WAIVING OBJECTIONS.

1. *Right to good title, although seller claims under purchaser.*
2. *General right to good title.*
3. *Condition to accept the title as it is.*
6. *May be proved bad, aliunde.*
7. *Title not to be produced and bad title produced.*
9. } *Condition not to produce deeds, not*
10. } *bound to take a bad title.*
11. *Condition as to identity: property not to be found.*
12. *Condition to accept a bond for title.*
13. *Observations on Clarke v. Faux.*
14. *Condition to take an indemnity against an alleged forged deed.*
15. *Solicitor buying from client with a title which he accepted.*
16. *Condition to avoid contract if title cannot be made.*
17. *Or objection not answered in a limited time.*
18. *Or purchaser's counsel object to title.*
19. *Roberts v. Wyatt and Williams v. Edwards distinguished.*
20. *Purchaser to elect whether contract shall be void.*
21. *Limited time to object after abstract delivered.*
23. *Possession a waiver of objections.*
24. *Waiver a question of fact.*
25. *Forcible possession by purchaser.*
26. *Right of sporting first disclosed in abstract.*
27. *Possession with long delay a waiver.*
29. *Although purchaser swear he did not mean it.*
30. *Lease by a purchaser to one in possession.*
31. *Possession and approbation of conveyance.*
33. *Possession under contract no waiver.*
34. *Or with vendor's concurrence.*
36. *And acts of ownership do not bind.*
38. *Re-selling where a waiver.*
40. *Or preparation of conveyance.*
- 41, 47. *Notice of limited title binding.*
42. *Purchaser not bound by his counsel's opinion.*
43. *Nor by his solicitor's statement if seller file a bill.*
44. *Objection taken when too late to be remedied, a device.*
45. *Purchaser accepting abstract may prove title bad.*
46. *Waiver of objections to title but not of proof.*
49. *Acquiescence a waiver.*
51. *Possession: interest and costs.*

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| 52. Seller turning purchaser out of possession has no equity.
53. Waiver restricted by subsequent acts.
54. Waiver qualified.
55. Waiver, and then bad title produced.
57. Purchaser rejecting title should relinquish possession. | 58. Purchaser keeping back one objection.
59. Opinion taken on title no waiver of collateral objection.
60. Authority of agent to waive.
64. Agreement to take defective title with covenants. |
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WE have already considered the *general* rules in regard to actions and suits by vendors and purchasers, to which we must now refer (*a*). But the rules applicable to proceedings in Court, where the question relates to the title, have been reserved for this chapter, in order that they may be placed in immediate connexion with the whole subject of title, upon which we are about to enter. But we must first consider the cases where a purchaser by his contract is precluded from calling for a title, or where he has by his conduct after the contract waived his right.

1. If the contract stipulate that the seller shall deduce and make a good title, he must do so although the seller claim under the purchaser as a mortgagee, with a power of sale, and therefore the purchaser was fully aware of the objection, which was that the property was out of repair and the landlord had a right of re-entry (*b*) (1).

2. The right to a good title is a right not growing out of the agreement between the parties, but is given by the law (*c*). But a vendor may of course stipulate that the purchaser shall accept the title, such as it is (*d*) (1); but a condition to take a title without its usual guards, *e. gr.*, a leasehold title without the lessor's title (*e*), or to cast upon the purchaser a responsibility which belongs to the seller, for example, to obtain the lessor's consent to an assignment, will not be inferred from ambiguous expressions, or from notice of the liability (*f*).

3. In the case of *Freem v. Wright* (*g*), where assignees, having

(*a*) Ch. 4, s. 4.

(*b*) *Burnett v. Wheeler*, 7 Mees. & Wels. 364.

(*c*) *Hall v. Betty*, 4 Mann. & Grang. 410.

(*d*) *Wilmot v. Wilkinson*, 6 Barn. & Cress. 506.

(*e*) *Souter v. Drake*, 5 Barn. & Adol.

992; *Spratt v. Jeffery*, 10 Barn. & Cress.

249; *Shepherd v. Keatley*, 1 Cro. Mees. & Rosc. 117; *Wheeler v. Wright*, 7 Mees. & Wels. 359.

(*f*) *Lloyd v. Crispe*, 5 Taunt. 249.

(*g*) 4 Madd. 361; *Molloy v. Sterne*, 1 Dru. & Walsh, 585, *et qu.*; *Taylor v. Martindale*, 1 You. & Coll. C. C. 658.

(1) A court of equity could not, as seems to have been supposed, have ordered the seller to obtain a release from the landlord. See the Report, p. 367.

(1) See *Brown v. Hall*, 5 Paige, 235.

a defective title, put it up to sale, and one of the conditions stated, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, *under such title as he lately *held the same*, an abstract of which might be seen at a place named in the conditions, the Vice-Chancellor stated, that a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have; and he held, that in this case the assignees sold only such title as they had; but as it was stated that the conditions of sale were not circulated before the sale, the purchaser was offered an inquiry as to this fact.

4. Conditions like that in *Freme v. Wright* should be looked at with great jealousy, as they are often traps for the unwary; and the Court should at least expect the fact to be broadly stated, that the seller only sell such title as he has, without warranting the same.

5. Where a man agreed to sell the two leases and the goodwill in trade of a house, &c., *as he held the same*, for twenty-eight years, &c., and the purchaser was to accept a proper assignment without requiring the lessor's title, although an objection to the lease, which was granted under a power, was shown by the purchaser, he was upon various grounds held to be concluded by the agreement: the construction was, that he should not be at liberty to raise any objections to the lessor's title; that the seller contracted to sell a qualified title only, and that the title of the party who granted the leases should not be inquired into; that as the purchaser contracted to pay for an assignment without requiring the lessor's title, it was an unreasonable construction that he was nevertheless at liberty to object to that title (*h*).

6. In a later case, a condition that the seller should not be obliged to produce the lessor's title, was held not to exclude the purchaser from showing *aliunde* that the title was bad; and Lord Lyndhurst, C. B., said that he did not say what his own opinion would have been upon the words of the clause in *Spratt v. Jeffery*, but he distinguished them from the words in the case before him; and Alderson, B., observed, that possibly upon the words used in *Spratt v. Jeffery* he might not have come to the same conclusion as the

(*h*) *Spratt v. Jeffery*, 10 Barn. & Cress. 249. By the purchase of a bad lease the party *may* derive the same benefit as if it were good, and if he cannot the lessee or his assignee has a remedy over against the grantor of the lease. The plaintiff,

therefore, may either have the premises for the two terms for which they were demised, or an equivalent compensation: *per* Bayley, J. p. 260; *qu.* this doctrine, and *qu.* the right to recover upon eviction.

Court of King's Bench did (i) ; and Gurney, B., said, that if the vendor of a lease intend to protect himself against showing a good *title in his lessor, he should use unambiguous language ; and Alderson, B., also observed, that *Spratt v. Jeffery* must have been decided on the ground that the contract amounted to a waiver of objections to the lessor's title altogether, and not merely to a production of it in evidence. He doubted if the decision could be supported on any other ground. It seems clear that *Spratt v. Jeffery* will not be followed as an authority.

7. Although the seller by condition stipulate that he shall not be bound to produce any title prior to the last conveyance, yet if he produce a defective title on the face of the abstract, the purchaser may reject it (j).

8. And a man simply buying the benefit of a proposal to take a building lease, signed by the intended lessee in the lessor's agent's books, cannot ask equity to relieve him, whether the landlord be bound or not (k).

9. In *Dick v. Donald*, in the House of Lords, where the articles of roup in Scotland bound the seller to execute and deliver a valid irredeemable disposition of the property, and to deliver to the purchaser certain specified instruments, "which are all the title-deeds of the property in his, the seller's custody," it was insisted that the title was limited by the articles of roup, but it was decided otherwise ; and Lord Lyndhurst said, that he could see nothing in the article of roup to take away the right to a good title. A valid and irredeemable disposition, which the articles undertook to give, must be by some person having the right to dispose. As to the condition with respect to the title-deeds, he never heard that because the seller provides, by the condition, that he will give to the purchaser only certain specified deeds, the purchaser must take a bad title, or such title as appears upon the deeds (l).

10. So where (m) by one of the conditions of sale, the seller was to deliver an abstract of title, and to deduce a good title, but as to part no title was to be required prior to a certain award, and by a subsequent condition the seller was to deliver the title-deeds, &c., in his custody to the largest purchaser, "but should not be bound to

(i) *Shepherd v. Keatley*, 1 Cro. Mees. & Ros. 117 ; 4 Tyr. 571 ; see 5 Barn. & Adol. 1002 ; 3 You. & Coll. 418.

(j) *Sellick v. Trevor*, 11 Mees. & Wels. 722.

(k) *Baxter v. Conolly*, 1 Jac. & Walk. 576.

(l) 1 Bligh, N. S. 655 ; see *Morris v. Kearsley*, 2 You. & Coll. 139, *post*, ch. 10.

(m) *Southby v. Hutt*, 2 Myl. & Cra. 207.

produce any original deed or other documents than those in his possession, and set forth in the abstract, or which relate to other property;" it was considered that the question was, whether the conditions amounted to a declaration that the purchaser was to *accept such title as the vendor had, as was stipulated in *Freme v. Wright*; and undoubtedly, the Court said, a vendor may so stipulate; but he is bound, if such be his meaning, to make the stipulation intelligible to the purchaser. The purchaser, in such a case, could not object to any infirmity in the title, or in the evidence to verify it; but it was held that a purchaser could not have so understood a contract by which it was stipulated that the vendor should deliver an abstract and deduce a good title. To the contract in the condition, to deduce and show a good title, there was no limitation or restriction: but to the contract to deliver up the title-deeds after the completion of the purchase, there was a restriction limiting the obligation to produce to such only as the vendor had in his possession. If the inference that the restriction as to the liability to deliver up certain deeds was to apply to the liability to produce them for the purpose of proving the title, was not obviously to be drawn from the conditions, would a court of equity compel a purchaser to take the estate without a title? The purchaser, therefore, was held upon the terms of the conditions not to be bound to complete the contract until he had a good title deduced and proved, either by the production of the deeds proposed to be abstracted, or by such other evidence as would prove the statements in the abstract to be correct.

11. Where the sale was made under a power in an annuity deed, and one plot of ground was referred to on a plan, and was presumed to abut on a given place, and it was stated in the condition that the plot could not be properly identified by the seller by reason of the death of the party who sold it to the grantor of the annuity, but it was fairly presumed that the purchaser, by inquiry in the vicinity, would be able to ascertain the true situation, *and he was to accept this plot by the description only contained in the conveyance deed of it*; it appeared that this plot did not exist or could not be discovered, and it was held at law, that the purchaser might rescind the contract, notwithstanding there was the usual condition making errors a subject of compensation (n) (1).

(n) *Robinson v. Musgrove*, 2 Mood. & Rob. 92.

(1) See *Chitty Contr.* (8th Am. ed.) 266 and notes; 1 Story Eq. Jur. §142 to §143 b.

12. In *Clarke v. Faux* (o), an estate was sold by assignees of a bankrupt, and a good title was to be made. One of the assignees was the purchaser, and took possession. He agreed to sell to Clarke, who entered into possession, and paid part of his purchase-money. A dispute was terminated by an agreement that Clarke should pay the residue of the purchase-money on a day named, *together with interest, upon the seller to him making a good title to the premises, or otherwise, if such title should not then be completed, upon the seller executing at his own expense a bond to complete such title, and to convey the estate as soon as the same could be completed. A good title could not be made by the seller to Clarke, but this seller recovered the residue of the purchase-money at law, having tendered a bond conditioned for making a good title to the purchaser (p). The Court of Common Pleas held, that the purchaser had shut his own mouth and bound himself to pay the money, on the single condition of having the bond executed. He made no other stipulation in the agreement, which was advisedly entered into with all the difficulties then objected quite apparent, and the objections then taken at the former time existing, and known to exist. The defendant had possession of the property, and might have had the benefit of the bond, which was all he stipulated for. He was bound then to pay the money, taking what he contracted for, the bond. Could the Court say that he was not bound by such a contract. With its improvidence the Court had nothing to do. It was a valid contract for good consideration, freely entered into on his part. He should have taken the bond, and if the title had not been completed in due time, he might resort to his remedy on the bond. But upon a bill filed by this purchaser for an injunction and a specific performance if there was a good title, and if not a return of the deposit, it was held that the meaning of the parties was, that the money was to be paid on the day named, although the title might not then be completed; but subject always to this condition, that the vendor had the power to complete it, and that it was not intended that it should be paid if the vendor did not possess such power. The stipulation as to the bond was merely intended to put a guard upon the money being paid, against supineness and delay in doing that which it was assumed the vendor had the means of doing, and which by the agreement he engaged to do, viz., to make a good title to the estate. The title, therefore, was referred to the Master.

(o) 3 Russ. 320.

(p) This is *Willett v. Clarke*, 10 Price, 207.

the purchaser having brought the money into Court upon obtaining an injunction.

13. When the decision *upon this point* was made in the Court of Chancery, it was not known that the court of law had pronounced a unanimous judgment the other way, although it was of course known that the seller had recovered at law. If the actual judgment had been known it would have been difficult to obtain *such a decree, for the construction of legal instruments must be the same both in equity and at law, and a court of equity, unless there is an equitable ground arising out of a contract, has no power to affix to it another construction, and overrule a legal decision upon it.

14. In a case (q) where the agreement stated that an alleged deed was set up by a third party, which the seller declared and had sworn to be a forgery, and that counsel, whose opinion might be seen, were of opinion that the concurrence of the alleged grantee was not necessary to make a good title, and it was stipulated that the purchaser should not make any objection on account of the deed, or be entitled to the concurrence of the grantee in it, but might, if he thought fit, retain a portion of the purchase-money as an indemnity, upon an action brought by the purchaser for his deposit the jury found a verdict for him, *and found that the deed was the deed of the seller*; but the Court of Exchequer, upon argument, held that if the agreement contained *a warranty*, that the deed was a forgery, yet the purchaser, because the allegation was untrue, could not rescind the contract, for they thought that the contract provided for the case of the deed being genuine by the indemnity, so that the purchaser's remedy, if there was a warranty, was by an action for the amount of the damages actually sustained thereby. They refused to decide the question as to the power of the seller to make a good title, without the concurrence of the grantee, because the agreement stated the opinions on that point, and the provision that the purchaser was not to make *any objection* on account of the deed was interdicted from *every species of objection* arising out of the deed. He knew of the supposed defect, or had the means of knowing it if he had chosen to use them by perusing the cases upon which the opinion was given. Upon a bill filed by the seller, a specific performance was decreed, the Court holding itself bound by the decision of the court of law. The learned Judge, in the course of the argument, said that the

(q) Corroll v. Cuttell, 4 Mees. & Wels. 731.

correct way of putting the case seems to be this: Suppose there was a waiver of the objection on the part of the purchaser, on the supposition that the affidavit was true, and it turns out, without any wilful falsehood being intended, that the affidavit is false, is or is not the purchaser bound by his conditional waiver when the condition is broken (r) ?

The true ground in equity must have been, that the condition *provided for the case of the deed being genuine, for if there was a warranty that the deed was a forgery, which was false, although not fraudulent, equity would not, it should seem, have specifically enforced the agreement for the seller after the warranty was broken—for the jury found that the deed was a valid one—and left the purchaser to his remedy at law, unless the agreement had clearly provided that the warranty should be accepted in lieu of title. Equality in equity.

15. In *Beever v. Simpson* (s), the Master of the Rolls held, that a solicitor, who had been employed by a person to advise on the title to a property, could not, on purchasing the same property from his client, set up an objection to the title which he did not think of any importance when advising his principal; and, further, that although there were two partners, and the purchaser, who was one of them, did not personally interfere with the title or the purchase by his client, and swore by his answer that he had no recollection of the title at the time of his purchase, yet these circumstances did not vary the rule.

16. A proviso, that in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase-money on the appointed day, the agreement should be utterly void, it being the intention of the parties that no action or suit in equity should be brought thereon, was held not to authorize the seller to say he cannot answer the objections to the title, and therefore the contract was void. The meaning is, that if the seller cannot make a title by the time mentioned, the contract shall be void as against him, and the purchaser has a right to be off his bargain. So *e contra*, if the purchaser does not pay the money, the seller may avoid the contract, but the purchaser cannot say, "I am not ready with my money, therefore I will avoid the contract," nor can the seller say, "My title is not good, therefore I shall be off." It

(r) *Cattell v. Corral*, 3 You. & Coll. 413; 4 Mees. & Wels. 734.

(s) *Tamlyn*, 69.

would be a monstrous construction if either party could vitiate the agreement by refusing to perform his part of it (*t*).

17. But where if objections were made by the purchaser, and not removed within a time limited, the vendor was to be at full liberty to annul the contract, and was to repay the deposit with interest and auction duty, but without costs; the purchaser made an objection *which the Court held was an untenable one*, and the vendor annulled the contract; the purchaser's bill for a specific performance was *dismissed with costs (*u*). This case, therefore, decided that if the purchaser under a mistake in law raise an objection which cannot be maintained, the seller, although he can make a good title, may under such a condition rescind the contract.

18. And where (*v*) there was the common condition, that errors in description should not annul the contract, but that there should be an abatement or equivalent, followed by a stipulation, that if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time stipulated, the agreement should be void and delivered up to be cancelled; it appeared that the seller could make a title to two-thirds only of the freeholds sold in fee simple, and that he had only a life interest in the remaining one-third, and in the copyholds sold. And it was held that the purchaser was not entitled to a specific performance with an abatement. For this title did not of course fall within the condition as to errors of description, and the clause avoiding the contract was the contract of both the vendor and purchaser. The Court considered that they might both think it equally to their interest that the agreement should be put an end to if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appeared to be nothing unreasonable in that. There might be circumstances which might make it very proper for both parties to insert that term, and as it was the contract of both parties, the Court could not make a new contract for them. The parties themselves had stipulated, that in a given event, which happened, the agreement should be void.

19. This case does not contradict that of *Roberts v. Wyatt*: it did not decide that the purchaser could wantonly reject the title by asserting that it was bad, but that the contract should be void in the case provided for, viz., the purchaser's counsel being of opinion that the title was bad. His counsel was of that opinion,

(*t*) *Roberts v. Wyatt*, 2 Taunt. 238;
Page v. Adam, 4 Beav. 269.

(*u*) *Page v. Adam*, 4 Beav. 269.

(*v*) *Williams v. Edwards*, 2 Sim. 78.

and the soundness of his opinion was not disputed. The Court held, not that this stipulation relieved the seller from making a title if he could, but that as he could not make a title, it relieved him from the common equity to convey what interest he had with an abatement. The seller would have been at liberty to show that the title was a good one, and that the opinion of the purchaser's counsel was erroneous, for such a stipulation is understood to mean a reasonable objection.

20. A stipulation in a contract that if the seller do not make a title by a given day, or the like, the contract shall be void, means *in construction of law, void at the option of the purchaser, who may enforce it notwithstanding the proviso (*x*).

21. A condition that every objection to the title shall be made within twenty-one days after the delivery of the abstract or shall be deemed waived, and that time in this respect shall be considered as of the essence of the contract, means after the delivery of a perfect abstract; it does not apply to an imperfect abstract from which it cannot be ascertained what objections there may be (*y*). And the purchaser is not precluded from taking objections which arise out of evidence called for before the time limited (*z*).

22. Sometimes a purchaser has waived his right to object to the seller's title. Upon an express waiver little difficulty is likely to arise, but in most cases the waiver is not express, but implied from the conduct of the purchaser, and I propose to consider, 1. What will amount to an implied waiver; 2. How far such a waiver may be modified or altogether nullified by subsequent conduct or discoveries.

23. A purchaser by entering into possession is generally held by that act to have waived the objections to title (*a*), for where a purchaser, knowing of an objection to a title, enters into possession of the estate, he may be considered to have himself executed the purchase (*b*). But he must be shown to have had distinct information of the objection (*c*) (1).

(*x*) *Rippingall v. Lloyd*, 2 Nev. & Mann. 410. 27; see *Binks v. Lord Rokeby*, 2 Swanst. 222.

(*y*) *Hobson v. Bell*, 2 Beav. 17.

(*z*) *Blacklow v. Laws*, 2 Hare, 40; (1) See 3 P. Wms. 193; *Warren v. Richardson*, You. 3.

Morley v. Cook, 2 Hare, 106.

(*c*) *Blacklow v. Laws*, 2 Hare, 40.

(*a*) *Fludyer v. Cocker*, 12 Ves. jun.

(1) Post, 402, in note.

24. The question in each case is one of fact : did the purchaser mean to waive, and has he actually waived his right of examining the title (*d*) ? although his *intention* will be inferred from his acts, and no direct expression of it is required. His silence, as we shall see, may be tantamount to the clearest expression of being content with the title.

25. Where a title could not be made to a most important, although a small part of the estate, and the seller was in treaty to obtain a title by means of an exchange, but the time for completing the purchase having arrived, the purchaser, after warning from the seller's agent of what the operation of his taking possession would be, took forcible possession, and encouraged the owner of the part wanted to ask an unreasonable consideration for it, in consequence *of which the treaty for the exchange went off, the Court held that the purchaser had waived the objection to the want of title, but not to a confirmation. The Lord Chancellor said, he had turned it much in his mind, whether there was not a ground arising from the purchaser's conduct, that he had bound himself not to make any further objection about the small part, and would have been glad to have found a line to do that, but there was not, as the matter had not totally ended there (*e*).

26. So in a case before referred to, where a right of sporting was not noticed in the particulars of sale, but was mentioned in the abstract of title and known to the purchaser's solicitor, but neither of them gave any intimation of it, and the purchaser upon his own application was let into possession, it was held that he had not only waived the objection, but was not even entitled to any compensation. The Court considered; that on the purchaser's being let into possession, the contract was completed, except the execution of the conveyance and the payment of the purchase-money, and the objection having been waived could not be set up again without some act of the seller's, or of some person authorized by him (*f*) (1).

27. And where by the contract the purchaser was to be let into immediate possession, and was to pay interest for a year, when the purchase-money was to be paid on having a good title, and possession was given accordingly, and an abstract delivered, to which no objection was made, but the purchaser had delayed to complete

(*d*) 3 Swanst. 168.

(*f*) Burrell v. Brown, 1 Jac. & Walk.

(*e*) Calcraft v. Roebuck, 1 Ves. jun. 168.

221.

(1) See Barnett v. Gaines, 8 Alabama, 373, cited post, 402 in note.

the purchase for upwards of three years after the day named, and had not paid all the interest due, the Court compelled him to accept the title without any investigation (*g*).

28. In a later case, where also possession was given under the contract, and the abstract was delivered, and the purchaser allowed more than two years to elapse before he took any objection to the title, which was about one year and a half after the time when the contract should have been completed, and in the meantime he had made alterations in the houses and let them, and written several letters, apologising for not having paid the purchase-money, he was decreed by his conduct to have accepted the title. The alterations of the premises, and the letting them, were considered acts strongly indicating an acceptance of the title, and the letters appeared to be founded upon an acceptance of the title, for till the title was accepted, the purchaser was not bound to pay the money (*h*).

*29. In a still later case, the purchaser, by his answer, swore that he did not mean to waive his objections to the title, but the Court said, that if a party acts in a manner from which it may be implied he does not mean to object to the title, he cannot afterwards, at a distance of time when evidence perhaps is lost, insist upon objections to the title.

30. In a case which arose out of a sale in bankruptcy, where the purchaser was the bankrupt's son, and he purchased with knowledge of an objection to the title, and after some months granted a lease for fourteen years to a son-in-law of the bankrupt, who was in possession under the bankrupt, the purchaser was held to have waived the objections to the title which really did exist. It was considered that he had purchased the estate to keep it in his family, to keep possession while he could and then shuffle with objections to the title. The purchaser intended to give the lessee possession under his title as purchaser, and intended to waive all objections to the title, for there were no objections of which he had not from the very first been fully aware (*i*). The ground relied upon, that the purchaser intended to waive all objections, is not reconcilable with the other ground, that he intended to shuffle with the title. The mere grant of a lease cannot of itself be

(*g*) *Fleetwood v. Green*, 15 Ves. jun. 594; see 3 Swanst. 172.

(*h*) *Margravine of Anspach v. Noel*, 1 Madd. 310; see 3 Swanst. 172; *Hall v. Laver*, 3 You. & Coll. 291; see Black-

ford v. Kirkpatrick, 6 Beav. 232.

(*i*) *Ex parte Sidebotham*, 1 Mont. & Ayr. 655; *ex parte Barrington*, 2 Mont. & Ayr. 255.

deemed an acceptance of a bad title, but coupled with other circumstances, it was in the above case held to amount to a waiver of the objections.

31. In a later case, where under an agreement for a lease, the tenant entered into possession, and, without requiring a title, returned a draft of a lease sent by the lessor with alterations, which were acceded to, and the draft was engrossed, and then disputes arising, a bill was filed by the lessor for a specific performance, and the lessee insisted upon his right to have the title produced, the Court was of opinion that he had by his conduct waived all objections to the title (*k*).

32. If a person be already in possession under the seller, and the purchaser grant him a lease, that will be held to be a taking possession, for the possession of the tenant is the possession of the landlord (*l*).

33. But if possession is authorized by the contract to be taken before a title is made, the fact of possession cannot by itself be *used against the purchaser (*m*), for that would be contrary to the very terms of the contract (*n*) (*1*).

34. And where a purchaser is entitled to call for a good title, his taking possession with the concurrence of the vendor will not amount to a waiver of right (*2*); and the subsequent delivery of abstracts or negotiations on the subject of title render this clear (*o*).

35. And if a purchaser do take possession, with notice of a defect which it is understood is to be remedied, he cannot be compelled to complete his purchase, but may recover his deposit if the title be not made good, unless it could be made out that he was to take the title as it stood: when the event is ascertained that a good title cannot be made, he is entitled to have his deposit back (*p*).

36. Acts of ownership, after an authorized possession, are of no importance; for what can be the purpose or advantage of taking possession, except to act as owner? And a fall of underwood in due course is no more than gathering a crop of corn or hay (*q*).

(*k*) *Warren v. Richardson*, You. 1.

(*o*) *Burroughs v. Oakley*, 3 Swanst.

(*l*) *Ex parte Sidebotham*, 1 Mont. & 159.
Ayr. 655; 2 Mont. & Ayr. 255.

(*p*) *Duncan v. Cafe*, 2 Mees. & Wels.

(*m*) *Dixon v. Astley*, 1 Mer. 133, and 244.
see ch. 4, s. 4, *supra*.

(*q*) S. C.

(*n*) *Stevens v. Guppy*, 3 Russ. 171.

(1) See *Tevis v. Richardson*, 7 Monroe, 657.

(2) See *Gans v. Renshaw*, 2 Barr, 34.

Nor would more important acts of ownership of themselves amount to a waiver of a good title ; even where possession of four acres was taken under the agreement, stubbing up an osier bed of nine perches, and levelling the land, and filling up a pond, were held not to be acts amounting to a waiver of objections to the title (*r*).

37. In *Small v. Attwood* (*s*), where the purchasers, who had been in possession, filed a bill to set aside the contract on the ground of fraud, it was objected by the seller that great alteration had taken place in the property ; that the trees had been cut down, and the surface had been altered ; but the Court observed that all this was in the natural exercise of the rights of the supposed owner of the property. There was no suggestion that satisfied the Court in point of evidence, that the purchasers had not acted fairly in the management of the property ; the whole was incident to the act done by the seller ; they were put into possession as owners, and they conducted themselves as owners till they discovered, as they thought, that they had been imposed upon, and they then stayed their hands and instituted the suit.

38. Attempting to resell the estate in an important circumstance upon this question of waiver, but that, like all other acts, may be *explained ; it may have taken place before any opinion was taken upon the title, although the objection was known : or it may have been made in order to ascertain the value, without intending to sell the property (*t*) : or it may be upon the presumption that a good title will be made. An actual resale, indeed, as far as mere title is concerned, can seldom be deemed an acceptance of it, because unless the first purchaser has bound the second to take the title as it stands, the former must intend to obtain a good title himself in order to confer it on the latter. Where a title cannot be made to a portion of the estate, and the purchaser attempts to resell that portion, that unexplained, or an actual resale, would show that he did not consider that portion (however in fact complicated with the estate) as material to the enjoyment of the bulk of the property, and therefore it would be so far a waiver, that he would be compelled to complete his purchase, with a compensation for the portion so offered to sale or sold (*u*).

39. A purchaser of a lease which had been agreed to be granted to the seller of a public-house and of the stock, was held to have

(*r*) *Osborne v. Harvey*, 1 You. & Coll. C. C. 116.

(*t*) *Knatchbull v. Grueber*, 1 Madd. 170.

(*s*) See You. 506, 507 ; see 6 Cl. & Fin. 232.

(*u*) See *Knatchbull v. Grueber*, *ubi sup.*

waived his right to call for the lessor's title, because he had entered into possession, and paid part of the money, and given security for the residue (all which was consistent with the contract), and had, subsequently to the grant of the lease to the seller, made a security to certain brewers upon his interest in the lease (*x*).

40. So the preparation of a conveyance may be an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, and may be supposed, therefore, to have removed or abandoned all objections (*y*). But this clearly is only a circumstance from which such an inference *may* be drawn. Standing by itself, it is not very important; for in many cases the conveyance is prepared upon the belief that the title will be cleared up.

41. If a purchaser, having full notice that he is not to expect a title beyond a limited period, concludes an agreement for purchase, he will be held to have waived his right (1). This is by matter of notice, and not of contract (*z*).

42. But a purchaser cannot be held to have waived objections to a title because his counsel has approved of the title. Lord Eldon determined, that where an abstract is laid before counsel, who approves the title, his approbation is not to be taken, as *against the person consulting him, as a waiver of all reasonable objections; the Court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the one first consulted may correct his error in a further opinion (*a*). This, it may be observed, was always the understanding of the Profession.

43. And although a purchaser's solicitor state that all the objections to the title are removed save one, and make such a statement in a case submitted to counsel, yet if the seller file a bill, the purchaser will be entitled to a general reference as to title. The Master of the Rolls observed, that the purchaser, by his

(*x*) Haydon v. Bell, 1 Beav. 337.

(*z*) See 3 Mer. 64.

(*y*) Burroughs v. Oakley, 3 Swanst.

(*a*) Deverell v. Lord Bolton, 18 Ves.

159; Harwood v. Bland, 1 Flan. & Kel.

505; Harwood v. Bland, 1 Flan. & Kel.

540.

540.

(1) See Lawrence v. Dale, 3 John. Ch. 23; M'Neven v. Livingston, 17 John. 437; Roach v. Rutherford, 4 Desaus. 126; Barnett v. Gaines, 8 Alabama, 373. A purchaser of land, who, with knowledge of an existing incumbrance, proceeds to execute the contract in part, as by taking possession, will be required to execute it in full, and, *a fortiori*, will not be allowed to rescind it. Barnett v. Gaines. 8 Alabama, 373.

contract was not bound to complete his purchase without a full and marketable title, and he had not done any act to the prejudice of the seller, either with respect to the possession of property or otherwise, which could affect his right to such marketable title. As to the waiver, the effect of the correspondence between the solicitors, and the statement in the case for the opinion of counsel, amounted to no more than this, that according to the advice which he had received, he was then willing to complete his contract, provided the objection as to the intestacy was removed. That objection, however, was never removed, and the voluntary assurance given at that particular time would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It might turn out upon inquiry before the Master that he had been ill advised as to the effect of some of the objections originally taken to the abstract; or it might turn out that there was matter destructive of the title of the seller, which did not appear upon the abstract [but this of course would furnish a distinct ground], and the reference to the Master was therefore made general as to the title (*b*).

44. A demand by a purchaser at the last hour of possession of some cottages, part of the purchase, which he knew to be in possession of weekly tenants, was treated as a waiver, and a device to rescind the contract (*c*).

45. The acceptance of an abstract as satisfactory only waives the objections in the abstract; and if in such a case the purchaser can prove the title bad, of course the contract could not be enforced (*d*).

*46. And of course a man may have accepted the title as it appears upon the abstract, and yet not have waived his right to have it proved as stated (*e*).

47. Statements in the abstract, that the seller has not in his possession or power certain of the deeds, or has them not in his possession, will bind the purchaser, if he proceed with the treaty without objecting on this head, not to object that those deeds are not delivered up to him on the completion of the purchase; but they do not inform him that the vendor is unable to give any proof of the existence or contents of the document set out in the abstract (*f*).

(*b*) *Lesturgeon v. Martin*, Myl. & Kee.
455.

(*c*) See 1 Per. & Dav. 381.

(*d*) 1 Yo. & Coll. 570, 571.

(*e*) *Southby v. Hutt*, 2 Myl. & Cra.
207.

(*f*) S. C.

48. And where an action was brought by a purchaser to recover his deposit for a mis-description of the restrictions in the lease by which the property was held; an abstract had been delivered, with a general statement of the restrictions, which did not give full information; objections were taken to the title, which were of no weight, or were answered, but the purchaser never required to see the lease. Upon the trial the objection was taken by the purchaser when the lease was produced. It was insisted that he had by his conduct waived the objection. The Court decided that there was no waiver, but the purchaser stood at the trial, as he might do, upon his legal right (*g*).

49. We may here observe, that a purchaser may, by simple acquiescence, be held to have waived objections to the title, although he has not taken possession (*h*). But if, having purchased out of Court, he go in under a decree, in a suit instituted for administering the estate, he will not be precluded from taking any objection which he otherwise might have taken (*i*).

50. If a seller can establish a case of an acceptance of title by the purchaser, he should not proceed on an order of reference as to title, or take any other step which shows that he does not rely upon the acceptance (*k*).

51. Possession being taken is an implied agreement to pay interest (*l*) (1), and would have weight as to costs (*m*).

52. Where the vendor in a contract for sale makes it part of the contract that the purchaser shall be let into immediate possession, and a question afterwards arises whether it is a case for compensation as to a part to which he is unable to make a title, the seller *cannot turn the purchaser out of possession, and afterwards file a bill for a specific performance. The purchaser had a right to retain possession under the contract until a conveyance should be executed, provided the difficulty about the title could be set to right. But the seller by his act destroyed the contract (*n*).

53. In *Calcraft v. Roebuck*, where the Court thought they could have held the conduct of the purchaser in taking forcible

(*g*) *Flight v. Booth*, 1 Bing. N. C. 370.

(*h*) *Fordyce v. Ford*, 4 Bro. C. C. 491;
see 6 Ves. jun. 679; 3 Mer. 146.

(*i*) *Cann v. Cann*, 1 Sim. & Stu. 284.

(*k*) *Harwood v. Bland*, 1 Flan. & Kel.
540.

(*l*) See 12 Ves. jun. 27; as to rent,
vide *supra*.

(*m*) See 15 Ves. jun. 464, *post*, ch. 16,
s. 2.

(*n*) *Knatchbull v. Grueber*, 3 Mer. 124.

(1) See *Buchanan v. Lorman*, 3 Gill, 82, Per Archer Ch. J.; *Brockenbrough*, 3 Leigh, 647, 648.

possession of the estate, with full knowledge of the want of title to a part of it, as amounting to a waiver of all objections (*o*), if the matter had totally ended there, yet held that the waiver was restricted so far, that although he was compelled to complete the purchase, he was entitled to a compensation for the part to which a title could not be made. This was in consequence of what passed subsequently to his taking possession; for the Court could not infer from his conduct, though he took possession with violence, that he in his own mind did agree to quit his hold upon this demand, nor that the seller understood him to do so, for the latter treated with him for a compromise subsequent to the taking possession; therefore if he fixed him with the possession, it was more in the nature of a penalty, which was an impossible ground for this purpose.

54. This is an instance where possession improperly taken is yet, by the acts of the parties, prevented from operating altogether as a waiver. So where the possession is properly obtained, but the acts would of themselves amount to a waiver, they may be so qualified by the purchaser as to render them inoperative. As where a purchaser being in possession, and knowing the infirmity of the title, did several acts from which it might be inferred that he did not consider a small portion of the estate, to which a title could not be made, important to the enjoyment of the estate itself, or the title to it of consequence, yet they were not held to be conclusive circumstances, because he was constantly asking for the title to this part of the property, and never appeared to have lost sight of a good title, but from first to last insisted upon it. And the title was not incurable, but might have been rendered good, if certain inquiries were satisfactorily answered; it was not absolutely but contingently bad. The Court observed, that a man, by going on to treat, does not waive an objection he is constantly *insisting upon. If nothing had been said of this part after the title to it had been found defective, the objection might have been considered as waived, but here he is perpetually desiring to have a good title. A treaty cannot waive that which he treats about (*p*).

55. And if a purchaser have actually waived his right to call for a title, and afterwards, for the purpose of settling a conveyance, a deed is produced which shows a bad title, he, notwithstanding his

(*o*) *Supra*, p. 368; 1 Ves. jun. 224.

(*p*) *Knatchbull v. Grueber*, 1 Madd. 179.

waiver, will not be compelled in equity to accept the bad title (*q*). This was decided in *Warren v. Richardson*. The Lord Chief Baron observed, that though the Court thought the purchaser had by his conduct waived that right, it had come out collaterally, that the vendor could not make a title according to his contract. It would be a great hardship upon a party to force him to accept a title which was ascertained to be defective. It would be contrary to all the rules which prevail upon the subject of specific performance. The principles upon which courts of equity have proceeded on the subject of specific performance, do not make a decree for a specific performance the necessary consequence under all circumstances of an agreement. Circumstances of hardship often prevent it. They recollect that the party is not without remedy, for, though he should be refused a specific performance, he has left to him his action upon the agreement. What created the difficulty in this case was, that the conduct of the party had barred his right to the usual investigation into the title, and this defect was a defect of title. If the objection had been to the conveyance merely, the defendant would have had the full benefit of it. But the objection was of another description: it was an objection to the title: it stood decided upon the record, that the defendant had waived his right to call upon the plaintiff for the production of his title; on the other hand, it was clear that the plaintiff could make no good title, and if the defendant took it, it would be defective.

56. In one case, Mansfield, C. J., left it to the jury to say whether, upon certain letters written by the purchaser, there had not been a waiver of the objections to the title. The jury found there had been no waiver, and the C. J. afterwards said, he was very indulgent to the seller in putting the question of waiver to the jury (*r*).

57. If a purchaser take possession under a contract, and he afterwards rejects the title, he must relinquish the possession, and *equity cannot prevent the vendor from turning him out by an ejectment, although he may have expended money in improvements (*s*) (1).

58. I may here observe, that according to a decision of Hart, L. C. in Ireland, if a purchaser having two grounds to be discharged, *e. g.*, a bad title and the felling of ornamental timber by the seller

(*q*) *Warren v. Richardson*, You. 1, (*s*) *Nicloson v. Wordsworth*, 2 *infra.* Swanst. 365.

(*r*) *Wilde v. Fort*, 4 Taunt. 334.

(1) *Gans v. Renshaw*, 2 Barr, 34.

after the sale, elects to go upon the objection to title, it does not amount to an abandonment of the other objection. It cannot be said, the Court observed, that when one contests the right to be held to his purchase, that he waives one ground whilst he continues to insist upon another. Perhaps he was not aware of the equitable principle that an alteration in the thing sold in particular cases will entitle the purchaser to be discharged. Even if he was conversant with the doctrine of the Court, he might also be aware that it had exercised its authority over purchasers sometimes in an arbitrary and undefined manner. He might think that the Court would compel him, upon compensation, to complete the contract, and thinking that no compensation would meet the precise case, endeavor upon the other ground to rid himself of it altogether. On that ground he had failed, for a good title was shown, but it was still open to him to resort to the objection for waste done (*t*). It might not, however, be safe for a purchaser to act upon this precedent.

59. Where a purchaser took counsel's opinion upon the abstract, who approved of the title, subject to some matters which were cleared up, and three months afterwards objected to the contract, on the ground that what was called a ground-rent in the particulars was a rack-rent; Lord Eldon, although the particulars of the rent reserved appeared upon the abstract, said, that he did not think it necessary, because the opinion of a conveyancer had been had, to force the party to take a subject essentially different from that which he contracted to purchase, and on which alone that opinion was called for (*u*).

60. If a man purchase as agent for another, and the title is not accurately described in the particulars, the agent cannot, without a fresh authority, by any act done by him unsanctioned by previous authority or subsequent approbation, bind the real purchaser either at law or in equity, for an agent cannot change the nature of his authority, but must have a fresh one for a different agreement. But when the purchaser and his counsel know the real nature of *the interest sold, and still act upon the agreement, there may be enough to amount to approbation of the agent's act, which ought therefore to have the same effect as if he had been previously authorized to contract for the property under such circumstances (*x*).

61. If a purchaser by his conduct waive an objection to the title,

(*t*) *Magennis v. Fallon*, 2 Moll. 591; (*x*) *Per Lord Eldon*, 18 Ves. jun. 509, and see *Flight v. Booth*, *supra*. 510.

(*u*) *Stewart v. Alliston*, 1 Mer. 26.

e. g., a right of sporting over the estate undisclosed in the contract, the seller will not be bound by a letter subsequently written by the clerk of his solicitor, without any authority, stating that no objection would be made to a reasonable compensation (*y*).

62. In *Paine v. Meller* (*z*), where, with a view to ascertain upon whom a loss by fire should fall, it was necessary to ascertain whether the purchaser had accepted the title, notwithstanding that it was open to objection, it appeared that after the delivery of abstracts and certain requisitions by the purchaser, particularly one requiring some annuities to be released; the treaty continued, and at last the purchaser's solicitor agreed to waive all objection if the seller would allow him 11 guineas, and if certain trustees would join in the conveyance, and refused a proposal to give up the purchase; the seller agreed to make the allowance desired. The deeds were engrossed, and the purchaser's solicitor declared himself satisfied with the title, and said the deeds would be ready in two or three days, and that he should complete the purchase under the promise of the 11 guineas. The house was then burned down, and the purchaser's solicitor reverted to an objection to the title, and called for the deposit. Lord Eldon said, that as to the fact of the acceptance of the title where there has been a great deal of treaty, and a considerable hardship must fall upon one party if the case is to be put entirely upon the fact, the Court must guard against surprise. The case, he observed, was not sufficiently clear upon the fact, and there ought to be some reference to the Master, or an inquiry before a jury, but that must not be on the validity of the title. The inquiry must be, whether the title had been accepted by the agent on the behalf of the purchaser before the day on which the fire happened. That inquiry would miscarry unless the Master or the jury, if satisfied that there was an *acquiescence* in the proposal, should be of opinion that was an *acceptance* of the proposal. He should think a court of law would hold that, but if there was any doubt of it, he would rather refer it to the Master, *to inquire whether the agent on the behalf of the purchaser had accepted or acquiesced in the proposal, with a direction that he should be examined, and they would appreciate the credit due to him, and would not forget that he was bartering for himself if that appeared (*I*).

(*y*) *Burnell v. Brown*, 1 Jac. & Walk. 168. (*z*) 6 Ves. jun. 349.

(*I*) This sum was probably to go in part discharge of his bill on account of extra expenses occasioned by the state of the title. If it was a bonus to the solicitor, he and the seller committed a fraud on the purchaser, and the loss by the fire ought not to have been borne by him.

63. We have elsewhere seen the operation of parol waivers at law, to which a reference only is now necessary (a).

64. It sometimes happens that a purchaser waives the objection, and consents to take a defective title, relying for his security on the vendor's covenants. Mr. Butler remarks, that where this is the case, the agreement of the parties should be particularly mentioned, as it has been argued, that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect (b). And it may be further observed, that in cases of this nature, unless the objection to the title appear on the face of the conveyance, the agreement to indemnify against the defect, and the covenants to guard against it, should be entered into by a separate instrument.

(a) *Supra*, pp. 166, 287.

(b) See Butler's n. (1) to Co. Lit. 384,

a. See also *Savage v. Whitbread*, 3 Cha. Rep. 14.

*SECTION II.

OF TITLE: IN SUITS IN EQUITY.

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| 1. <i>Seller with equitable estate.</i> | 23. <i>Contract cancelled where no title.</i> |
| 2. <i>Doubtful title.</i> | 24. <i>Deposit ordered into Court.</i> |
| 4. <i>Reference of title.</i> | 25. <i>Purchase-money ordered into Court.</i> |
| 6. <i>Reference back where new fact.</i> | 26. <i>New evidence before Master.</i> |
| 7, 10. <i>Or where seller can clear up objections.</i> | 27. <i>Master's report where legal estate outstanding.</i> |
| 9. <i>Exceptions to report of title.</i> | 28. <i>Pendency of a suit for the estate.</i> |
| 11. <i>Purchaser plaintiff, and there is no title.</i> | 29. <i>Report of conditional title bad.</i> |
| 13. <i>Observations on Nicolson v. Wordsworth.</i> | 30. <i>Where exceptions should stand over.</i> |
| 15. <i>Objections considered by Court.</i> | 31. <i>Exceptions without objections.</i> |
| 16. <i>Reference of title upon motion.</i> | 32. <i>Purchaser not to file a cross bill if title bad.</i> |
| 18. <i>Unless other questions raised.</i> | 33. <i>Bad title no decree for purchaser.</i> |
| 19. <i>Inquiry when a title was shown.</i> | 14, } <i>Purchaser may take bad title.</i> |
| 20. <i>What may be referred.</i> | 34. } |
| 21. <i>Dismissal of bill upon motion.</i> | 36. <i>Seller obtaining good title after conveyance.</i> |
| 22. <i>Decree without reference where delay.</i> | 38. <i>Man buying his own estate.</i> |
| | 39. <i>Sale of a remainder already barred.</i> |

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| 40. <i>Purchaser neglecting to examine title.</i> | 43. <i>Champerty.</i> |
| 41. <i>Sale of pretended title.</i> | 44. <i>Maintenance.</i> |
| 42. <i>Sale of estate contracted for, good.</i> | 45. <i>Slander of title.</i> |

1. WE have already considered the general rules by which a court of equity is guided in granting a specific performance, and the cases in which either party may maintain an action for breach of contract. And we are now more particularly to inquire into those remedies where, as is usually the case, the dispute turns upon the alleged or admitted defect of title. And first as to relief in equity.

2. To enable equity to decree a specific performance against a vendor, it is not necessary that he should have the legal estate, for if he has an equitable title a performance in specie will be decreed (*a*), and he must obtain the concurrence of the persons seised of the legal estate.

3. But in suits for specific performance of contracts, it is always in the discretion of the Court whether they will decree a specific performance or not (1). In the particular case of a bill for a specific *performance of a contract for the sale of an estate, where there are considerable difficulties on the face of the title, and there are no means of clearing them up, and no jurisdiction to bind the question, that is not the case for decreeing a specific performance (*b*).

4. In all cases where a bill in equity is filed for a specific performance, either party may in general, if he please, have a reference as to the title (2). The vendor is entitled to this privilege in order to enable him to make out a title before a Master. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the Court never acts upon the fact, that a satisfactory abstract was delivered; unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference;

(*a*) *Crop v. Norton*, 2 Atk. 74; see (*b*) *Per Eyre*, Lord Commis. 4 Bro. C. Costigan *v.* Hastler, 2 Scho. & Lef. 160. C. 87, *post*, ch. 10.

(1) Ante, 235, and notes.

(2) *Cooper v. Deane*, 1 Vesey, jr. (Sumner's ed.) 565, 567, note (6) of Mr. Hovenden; *Frost v. Brunson*, 6 Yerger, 36; *M'Comb v. Wright*, 4 John. Ch. 659; *Beverley v. Lawson*, 3 Munf. 317. But if it manifestly appears from the bill and answer, that no title can be made, the reference will not be ordered. *Frost v. Brunson*, 6 Yerger, 36; 2 Daniell Ch. Pr. (Perkins's ed.) 1413, and note.

because, by the production of papers, which can be enforced, and by the examinations and inquiries which can be made, by virtue of the decree, the title may be examined in a manner it never could upon a mere abstract (*c*). Either party may, however, waive this right (*1*).

5. Where a man makes a purchase of an estate, to which the vendor represents that he has a good title, in such a case the purchaser has a right to insist, that the question whether he have or have not a good title shall be sifted to the bottom before he can be called upon to adopt either alternative, and before the vendor can be let off from his original contract (*d*).

6. If, after the confirmation of a report in favor of a title, a new fact appear, by which the title is affected, the title will be referred back to the Master (*e*). In a case where the seller of a leasehold estate produced the leasehold title, which the Master thought sufficient, and reported accordingly; but the Court held, that the lessor's title ought to have been produced, and sent it back to the Master to review his report; the seller had liberty given to him to produce the freehold title. And it was considered that the purchaser was at liberty to enter into objections to the leasehold title, which were not taken upon the former discussions before the Master (*f*). And, upon the objections being afterwards taken, the bill was dismissed (*g*). The course of the Court is, where the Master has, by expressing an opinion in favor of the title, prevented the vendor from showing, that if his opinion had been otherwise, still the title was good, to send it *back to the Master to review his report. Therefore where a seller contended that a devise was too remote, and the Master so held, and reported in favor of the title, but the Court overruled the report, it was sent back to the Master upon the seller's allegation that the devise was immaterial as all the limitations had failed (*h*). If the order sending it back be not made when the exception is overruled, the seller must apply quickly and pay the costs (*i*) (2).

7. So where it appears at the hearing upon the exceptions, that the seller can clear up the objection, the Court has sometimes sent

(*c*) See Lord Eldon's judgment in *Jenkins v. Hiles*, 6 Ves. jun. 653.

(*d*) 3 Mer. 137, *per* Lord Eldon.

(*e*) *Jendwine v. Alcock*, 1 Madd. 597.

(*f*) *Fildes v. Hooker*, 2 Mer. 424.
Andrew v. Andrew, 3 Sim. 390.

(*g*) S. C. V. C. 3d April 1818, MS. 3 Madd. 193.

(*h*) *Egerton v. Jones*, 3 Sim. 392; 1 Russ. & Myl. 694.

(*i*) S. C.

(1) 2 Daniell Ch. Pr. (Perkins's ed.) 1194, 1195.

(2) 2 Daniell Ch. Pr. (Perkins's ed.) 1416, 1417.

the title back to the Master to review his report, and in such a case it is not necessary, as it was held by Lord Eldon, that the Master should have liberty to receive further evidence. He may receive such evidence without any express authority. In the case of *Esdaile v. Stephenson* (*k*), it appeared that the estate was subject to a rent-charge, and a term to secure it; and the purchaser's counsel, before the Master, required the seller to produce a release of it, or evidence that the jointress would release; but although he did not do so, the Master reported, that the seller could make a good title upon the jointress releasing. To this report exceptions were taken. The Vice-Chancellor consulted the Lord Chancellor, and stated their opinion to be, that the report was wrong. It should have been, that the seller could not make a good title unless the jointress joined; and the Vice-Chancellor recommended in future, the form of such a report to be, that the seller could *not* make a good title, because *A* is a jointress, and no sufficient evidence has been produced to show that she will release. The Lord Chancellor and the Vice-Chancellor agreed, that if a title upon a new fact can be made between the report and the further directions, the Court will enforce the contract, as if in the above case the jointress had agreed to join when the cause came on for further directions: In such a case the Court would expect counsel to appear, and consent that she would concur. This points out the necessity in such cases of setting down the cause upon further directions at the same time with the exceptions. In *Esdaile v. Stephenson*, as the exceptions only were before the Court, they were ordered to stand over, with liberty to set down the cause for further directions, and then the exceptions and further directions to come on together. It was expressly laid down, that the Court would not allow a seller to lie by before the Master, and then upon further directions attempt to *make a title. There was an appeal from this decision, but it was withdrawn, and the purchase was completed.

8. And in another case, heard a few months before, where the Master reported that a good title could be made, except as to so much as a widow was entitled to in respect of her dower, she refusing to join in the conveyance to the purchaser; upon further directions, the Vice-Chancellor held, that if at the hearing on further directions, the vendor was prepared to cure the objection

(*k*) V. C. 8 Aug. 1822. MS. S. C. 6 Hobson *v.* Bell, 2 Beav. 17; Sidebotham
Madd. 366; Paton *v.* Rogers, 6 Madd. *v.* Barrington, 4 Beav. 110; Jumpson *v.*
256; Magennis *v.* Fallon, 2 Moll. 533; Pitchers, 1 Coll. 13.

to the title which was reported by the Master, that he was in time to do so; and he accordingly in this case decreed a specific performance upon an affidavit that the widow agreed to join in the conveyance, and that the seller (I) undertook to procure her to join in such conveyance (I). And in a case (*m*) where the report was *in favor* of the title, but an exception was allowed on account of a subsisting rent charge, although the case came on at the same time for further directions, and it was insisted that the bill should be dismissed, the Court thought it hard that the seller should be placed in a worse situation by the report being in his favor, than if it had been the other way, when he would of course have taken the necessary steps for curing the defect in the title before the further directions were brought on, and so time was allowed to the seller to remove the objection.

9. If exceptions are taken to the report, that a good title can be made, and are overruled, other objections to the title cannot be made; but if exceptions are allowed, and a new abstract of title is delivered, further objections may of course be brought in (*n*).

10. In *Noel v. Hoy* (*o*), the seller rested his title on the construction of a will, by which he insisted the estate did not pass. The point was decided against him, and then he asked for a reference to the Master, to see whether he could make a good title, as he insisted that the devisees were trustees for him. This reference was objected to by the purchaser. The Court said, that it should have great difficulty in allowing the plaintiff after a decree to amend his bill, by bringing new parties before the Court. But time had been allowed to get an act of parliament. If the Master was of opinion that the devisees were trustees for the seller, he would report in favor of the title. If a suit should be necessary to try their equity, he would report against it.

*11. A purchaser may file a bill for a specific performance, although it appears by the abstract that the vendor has no title, and yet unless he chooses to take the title, the court cannot force it upon him, on the ground of his having filed the bill with a knowledge of the objection (*p*).

12. In one case (*q*) where the purchaser being in possession and

(I) *Paton v. Rogers*, 6 Madd. 256, April 1822.

(o) V. C. 23 Feb. 1820, MS.

(p) *Stapylton v. Scott*, 16 Ves. jun.

(m) *Portman v. Mill*, 1 Russ. & Myl. 696.

272. [Sumner's ed. notes.]

(n) *Brooke v. —*, 4 Madd. 212.

(q) *Nicloson v. Wordsworth*, 2 Swanst. 365; see 3 Myl. & Cra. 710.

(I) The defendant is printed by mistake for the plaintiff in the report.

an ejectment having been brought against him by the two sellers and a third person (who were devisees in trust for sale, and the latter had released to the two former), filed his bill for a specific performance, alleging that the two trustees who had sold, could not alone make a good title, and that he would be bound to see to the application of the purchase-money, unless the contract was executed under the direction of the Court, and suggesting that the third trustee had suffered his name to be used at the suggestion of the sellers; the bill prayed a specific performance, and that the defendants might execute and procure to be executed a good conveyance with a good title, and a sufficient discharge for the purchase-money, or that the purchase-money might be paid into Court. The answer submitted that the two sellers could alone make a good title and give a valid discharge. Lord Eldon, upon a question as to dissolving the common injunction, observed, that the question came before the Court in a singular shape. He understood that the third trustee was not a party to the contract, the plaintiff therefore could not insist on his being a party to the conveyance. If the suit had been commenced by the defendants against the plaintiff, the Court must have decided the question whether the defendants could make a good title; but was the form of the record such that any judgment could then be pronounced? The plaintiff had filed the bill for specific performance himself, insisting that his vendors cannot make a good title. He could only say, that if the purchaser did not choose to take the title which they could give, he could have no decree. To raise the question properly on the record, the defendants should have been plaintiffs. The injunction must of necessity be dissolved, if the plaintiff will not accept the title of the defendants. When on a bill by a vendee for specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs. If the plaintiff insist that the title is not good, he cannot resist the ejectment of those who were previously in possession of the land. Rejecting the title, he must relinquish possession. Upon a subsequent occasion, Lord Eldon observed, either the plaintiff must take *such title as the parties with whom he has contracted can give him, or he cannot have a conveyance. If the vendors had been plaintiffs, the Court must have determined whether the title was good: here the purchaser claims specific performance, at the same time insisting that his vendors cannot make a good title. In the result, a decree was taken by consent.

13. Perhaps these observations from so great an authority have a tendency to mislead. If a man file a bill simply stating that the seller cannot make a good title, of course he must accept the best title which the seller can make or have his bill dismissed. But that was not the frame of the suit in *Nicloson v. Wordsworth*; the bill supposed that the sellers had a right to or could procure the concurrence of the third trustee, who was acting at their instigation, or that the payment of the money into court would obviate the objection. There appears, therefore, to have been no obstacle in the way of the Court's deciding upon these points, although the purchaser was plaintiff, for undoubtedly a purchaser may file a bill for a specific performance, and have the title investigated before the Master, and obtain the opinion of the Court upon it.

14. In a recent case (*r*), the purchaser's bill prayed a specific performance, "if a good title could be made," and after the usual decree the report, which was not excepted to, was against the title; it was held, that the purchaser was at liberty to accept the title such as it was, but as he was acquainted with the objections at the hearing, he was fixed with the costs of investigating the title.

15. Where objections are made by a purchaser, evidently with a view to gain time, the Court itself will enter into the consideration of the objections, without referring the title to a Master.

16. So where a bill is filed by a purchaser, the vendor, the defendant, has been allowed, after answer, and before the hearing of the cause, to move that an inquiry may be directed as to the title, and at what time the abstract was delivered, and whether it was sufficient. This was allowed, in order to enable the Court to dispose of the cause with despatch (*s*). Again, where a vendor filed a bill for a specific performance, and the purchaser submitted to perform the contract, if a good title could be made, asserting that upon the abstract a good title could not be made, it was, upon the motion of the plaintiff, referred to the Master to inquire whether a good title could be made, and whether it appeared upon the abstract that a good title could be made (*t*). Lord Eldon has observed, that some degree of irritation was excited in the Court by persons called *land-jobbers, contracting for estates without any intention of paying for them, and setting up defects of title, merely with the view of gaining time to dispose of them; and, on that ground, Lord Rosslyn was prevailed upon to direct a reference of the title imme-

(*r*) *Bennett v. Fowler*, 2 Beav. 302.

(*t*) *Wright v. Bond*, 11 Ves. jun. 39.

(*s*) *Moss v. Matthews*, 3 Ves. jun. 279.

diately, on motion; and there is not much mischief in that upon a simple case of specific performance, where there is nothing more; but the relief may be so modified and qualified, with reference to the nature and object of the contract, that unless it is purely that point, great difficulty may arise (*u*).

17. In a later case, Lord Eldon directed a reference of the title upon the bill of a vendor, before the answer was put in. The bill was a mere averment of the contract, putting no special fact in issue, and the Court considered the plaintiff as undertaking to do all such acts, for the purpose of executing what the Court thinks right, as if the answer was in, and the cause brought to a hearing. With that undertaking, if they cannot state any objection to the performance, and the reference is merely to look into the title, he did not apprehend the answer to be necessary before that reference (*v*). But if the defendant's counsel state that there are other objections, the title cannot be referred (*x*).

18. And in every case where the answer, upon reasons solid or frivolous, insists, that the agreement ought not to be executed, the Court must first dispose of the question raised (*y*). Therefore, where the question simply was, whether the vendor of a leasehold estate was bound to produce the lessor's title, a motion by the purchaser for a reference to the Master upon the title was refused (*z*). So where the defendant, the purchaser, alleges laches on the part of the plaintiff, as a ground for his not being compelled to perform the agreement, the Court will decide the question raised, before the title is referred to the Master (*a*).

19. Until lately, it was not the general practice, to make an inquiry, *ab ante*, at what time the plaintiff could make a title (*b*). *If, upon the usual reference to the Master to inquire whether the seller could make a good title, he reported in the affirmative, it might, with a view to costs, have been referred back to the Master, to inquire whether a good title could have been made at the filing

(*u*) 17 Ves. jun. 278.

(*v*) *Balmanno v. Lumley*, 1 Ves. & Beam. 224.

(*x*) *Matthews v. Dana*, 3 Madd. 470.

(*y*) *Blyth v. Elmherst*, 1 Ves. & Beam. 1; see *Paton v. Rogers*, *ibid.* 351; *Biscoe v. Brett*, 2 Ves. & Beam. 377; *Fullagar v. Clark*, 18 Ves. jun. 481; *Morgan v. Shaw*, 2 Mer. 138; *Böehm v. Wood*, 1 Jac. & Walk. 419; *Withy v. Cottle*, Turn. & Russ. 78; 1 Sim. & Stu. 174; *Gordon v. Ball*, 1 Sim. & Stu. 178; *Boyes v. Liddell*, 1 You. & Coll. C. C.

133.

(*z*) *Gompertz v. —*, 12 Ves. jun. 17. See *Eldridge v. Porter*, 14 Ves. jun. 139; and see 17 Ves. jun. 278.

(*a*) See *Blyth v. Elmherst*, *ubi sup.* *Skelton's case*, 1 Ves. & Bea. 517; *Wallinger v. Hilbert*, 1 Mer. 104; *Lowe v. Manners*, 1 Mer. 19; *Portman v. Mill*, 2 Russ. 570.

(*b*) *Gibson v. Clarke*, 2 Ves. & Bea. 103. See *Jennings v. Hopton*, 1 Madd. 211; and see *Lubin v. Lightbody*, 8 Price, 606.

of the bill; and if not, when it was that a good title could be made (c); and this reference might be made as well after a decree, as after an interlocutory order. The Vice-Chancellor (Sir John Leach) considered, that great additional expense and delay were occasioned by parties not asking, in the first instance, where the circumstances of the case made it material, that if the Master should find that a good title could be made, then he might inquire when such good title was first shown to the purchaser (d). In a later case of *Harington v. Secretan*, where the purchaser moved for a second order, the learned Judge, under the circumstances, granted the motion; but made a general rule, with the approbation of the bar, which has since been regularly followed, that the first reference should be to see whether a good title can be made, and if so, *at the request of either party*, to inquire when the seller showed a title. This rule appears to be entirely free from objection. The directions usual in decrees, for the production of deeds, &c. and for the examination of parties on oath, ought to be inserted in the order, and further directions and costs ought to be reserved (e).

20. Every thing that appears to be connected with the title may be the subject of a reference by motion. Where therefore the purchaser, by his answer, stated that no evidence of identity had been furnished, an addition was made to the ordinary reference for an inquiry, whether the defendant objected at any time to the want of such evidence. But an inquiry whether the abstract was perfect, and if deficient, in what respects its deficiency consisted, and whether it was ever perfected, was refused as not being sanctioned by the practice of the Court (f). Under such a reference the Master may examine witnesses, just as if the reference had been made by a regular decree (g).

21. Where the title is referred to the Master upon motion, and the report is against the title, the defendant may move to dismiss the bill with costs, and the Court can make the order without setting down the cause (h).

22. Where the purchaser has been a long time in possession of the estate, and of the abstract, without objecting to the title, a specific performance will be decreed at once without a reference as

(c) *Daly v. Osborne*, 1 Mer. 332; *Birch v. Haynes*, 2 Mer. 444.

(d) *Hyde v. Wroughton*, 3 Madd. 279. See *Anon.* 3 Madd. 495.

(e) *Winterbottom v. Ingham*, 9 Sim. 654.

(f) *Bennett v. Rees*, 1 Kee. 405.

(g) *Woodroffe v. Titterton*, 8 Sim. 238.

(h) *Walters v. Pym*, 19 Ves. 351; *Whitcomb v. Foley*, V. C. 1821, MS.; S. C. 6 Madd. 3.

to the title (*i*). But the question depends upon a conclusion of fact. The Court must be satisfied that the purchaser intended to waive, and has actually waived his right of examining the title, and of course the waiver may itself be rebutted by the conduct of the seller, *e. g.*, in furnishing further documents to make out the title (*j*).

23. If a purchaser has been long in possession without having paid the purchase-money, or rent, or interest, and will neither abandon the contract nor accept the best title which the seller can make, so that he is acting manifestly unjustly, the latter may file a bill to have the agreement delivered up to be cancelled, or that the purchaser may accept such title as he can make, and for an account of rents; and if the Master report against the title, and the purchaser reject it, the agreement will be ordered to be delivered up to be cancelled, an account of the rents will also be ordered, and the seller will have to pay the costs of the suit (*k*).

24. Where a vendor files a bill for an injunction and a specific performance, the Court will, upon granting the injunction, put him upon proper terms, and therefore will in most cases order him to pay the deposit into Court. But where the seller, at the time when the bill is filed, is able and willing to make a good title to the estate sold, and the purchaser improperly refuses to complete the contract, although the seller is in possession of the estate, he will not be compelled to pay the deposit into Court, because it is the fault of the purchaser, and not of the seller, that the latter retains both the deposit and the estate (*l*).

25. We have already seen that where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them, that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into Court in a summary way, nor can the payment be compelled where the purchaser was in possession under another title, before the contract, (*m*).

26. Although the defendant, by his answer, put in issue an objection to the title, and both parties examine witnesses to the point

(*i*) *Fleetwood v. Green*, 15 Ves. jun. 594; *Margravine of Anspach v. Noel*, 1 Madd. 310; *Ex parte Sidebottom*, 1 Mont. & Ayr. 655; *Ex parte Barrington*, 2 Mont. & Ayr. 245; *Southby v. Hutt*, 2 Myl. & Cra. 207.

(*j*) *Burrowes v. Oakley*, 3 Swanst. 159.

(*k*) *King v. King*, 1 Myl. & Kcc. 442; a case of great difficulty.

(*l*) *Wynne v. Griffith*, 1 Sim. & Stu. 147.

(*m*) *Supra*, 249.

*before the hearing, yet, upon a reference to the Master, both sides may produce further evidence before him (*n*).

27. If the seller has vested in him legally, or equitably, all the interest in the estate, it cannot be objected to the Master's report in favor of the title, that the legal estate is outstanding, although in a lunatic, against whom no commission has issued (*i*). The vendor has the power, provided he will take the means necessary for the purpose, of making a good title. If he neglect this, the question will properly arise when the Master comes to settle the conveyance (*o*).

28. If a seller file a bill for a specific performance, and a third party file a bill against him, claiming a right to the estate, the mere fact of the pendency of the latter suit is not a sufficient reason for a Master's stating that a good title cannot be made, but the nature of the adverse claim should be examined and stated (*p*).

29. A good title should not be reported conditionally : for example legatees' discharges should be produced, and not an undertaking to procure them, and then a report that a good title can be made upon payment of the legacies (*q*).

30. It may here be observed, that if an exception taken to a report that a good title cannot be made, be overruled, the vendor should obtain an order for the exception to stand over, as, if disallowed, it would appear upon record that a good title could not be made (*r*). If exceptions be taken to the Master's report in favor of the title, and the Court think the title a doubtful one, the bill may upon further directions be dismissed, without either overruling or allowing the exceptions (*s*).

31. The general rule is, that a party cannot except to a report unless he has carried in objections to the draft of it ; but if a purchaser is taken by surprise, by the Master for example, he will be allowed to except to a report of good title, notwithstanding that he did not object to the draft of the report (*t*).

32. If the purchaser's defence to a bill for a specific performance rest merely on the want of title in the vendor, he ought to depend on his answer, and not to file a cross-bill to have the agreement

(*n*) *Vancouver v. Bliss*, 11 Ves. jun. 458.

(*o*) *Berkeley v. Dauh*, 16 Ves. jun. 380 ; see 11 Mees. & Wels. 728.

(*p*) *Osbaldeston v. Askew*, 1 Russ. 160.

(*q*) *Magennis v. Fallon*, 2 Moll. 575.

(*r*) See 1 Ves. jun. 567.

(*s*) *Wileox v. Bellaers*, Turn. & Russ. 491 ; *Robinson v. Milner*, 1 Hare, 578, n.

(*t*) *Wood v. Lambirth*, 9 Sim. 195.

delivered up; because the vendor can make no use of the contract if he have no title (*u*).

33. Where a *bona fide* vendor has not a title to the estate, the *Court will not, in favor of the purchaser, decree an impossibility, but will leave the purchaser to his remedy at law upon the articles (*v*); and, although he must necessarily obtain a verdict, if he have recourse to law, yet, as we shall see, he would obtain nominal damages only (*x*), for a purchaser is not entitled to any compensation for the fancied goodness of his bargain, which he may suppose he has lost.

34. But where the purchaser is willing to take the title, such as it is, it is apprehended that he may do so. In a case (*y*) before Lord Redesdale, he said, that the plaintiff in equity must show that in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do: for if he does, a consequence is produced that quite passes by the object of the Court in exercising the jurisdiction, which is to do more complete justice. If a party is compelled to do an act which he is not lawfully authorized to do, he is exposed to a new action for damages, at the suit of the person injured by such act; and, therefore, if a bill is filed for a specific performance of an agreement made by a man who appears to have a bad title, he is not compellable to execute it, unless the party seeking performance is willing to accept such a title as he can give, and that only in case where an injury would be sustained by the party plaintiff, in case he were not to get such an execution of the agreement as the defendant can give. He took the reason to be this, among others, not only that it is laying the foundation of an action at law, in which damages may be recovered against the party, but also that it is by possibility injuring a third person, by creating a title with which he may have to contend.

35. It is, however, the received opinion, that the purchaser may elect to take the title, such as it is, although no injury would be sustained by him in case the agreement were not executed, nor does the rule seem to lead to the difficulty which has been apprehended; for, in such a case, the covenants must, of course, be so

(*u*) *Hilton v. Barrow*, 1 Ves. jun. 231.
 (*v*) *Crop v. Norton*, 2 Atk. 74; 9 Mod. 233; *Cornwall v. Williams*, Colles, P. C. 390; *Bennet College v. Carey*, 3 Bro. C. C. 390; *supra*, p. 242; and see *King v. King*, *supra*, pl. 23.

(*x*) *Fleureau v. Thornhill*, 2 Blackst. 1078; and see 3 Bos. & Pul. 167. See *Brig's case*, Palm. 361. *Vide post*.

(*y*) *Harnett v. Yielding*, 2 Scho. & Lef. 549. See *post*; and see *supra*, pl. 14.

framed, as not to leave the seller exposed to an action on account of the flaw in the title; but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller, equity seems to refuse its aid on substantial grounds (*z*).

*36. And if a man sell an estate to which he has *no title*, and after the conveyance acquire the title, he will be compelled to convey it to the purchaser (1).

37. But it seems to have been considered, that this is a personal equity attaching on the conscience of the party, and not descending with the land; and therefore, that if the vendor do not in his life-time confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract (*a*). This opinion, however, deserves great consideration.

38. If a person having a right to an estate, purchase it of another person being ignorant of his own title, equity will compel the vendor to refund the purchase-money, with interest from the time of bringing the bill, although no fraud appear (*b*).

39. So where a person sold a remainder expectant upon an estate tail, and both parties considered that the remainder was unbarred, and it afterwards appeared that a recovery had been suffered before the contract, the purchaser was relieved against a bond which he had given for the purchase-money, and the seller was compelled to repay the interest which he had received (*c*). This was a strong decision. The purchaser might have ascertained the fact by search. The Chief Baron laid down some very general propositions. His Lordship said, "that if a person sell an estate, having no interest in it at the time, and takes a bond for securing the payment of the purchase-money, that is certainly a fraud, although both parties should be ignorant of it at the time (*d*).

(*z*) See *Ellard v. Lord Llandaff*, 1 Ball & Beatty, 244. See *O'Rourke v. Percival*, 2 Ball & Beatty, 56.

(*a*) *Morse v. Falkener*, 1 Anstr. 11; *Carleton v. Leighton*, 3 Mer. 667. See *Bensley v. Burdon*, 2 Sim. & Stu. 516, upon appeal affirmed, but the principal point upon estoppel has since been properly overruled.

(*b*) *Bingham v. Bingham*, 1 Ves. 126. See *Lansdown v. Lansdown*, Mose. 364;

Saunders v. Lord Annesley, 2 Scho. & Lef. 101; *Leonard v. Leonard*, 2 Ball & Beat. 171; *Stewart v. Stewart*, 6 Cla. & Fin. 911.

(*c*) *Hitchcock v. Giddings*, 4 Price, 135. [See the remarks on this case in *Bates v. Delavan*, 5 Paige, 307.]

(*d*) But see 2 Cro. 196; 2 Ld. Raym. 1118; 1 T. Rep. 755; 2 Freem. 106; and *post*, ch. 12.

(1) *Graham v. Hackwith*, 1 A. K. Marsh. 423; *Tyson v. Passmore*, 2 Barr. 122. In *Trask v. Vinson*, 20 Pick. 105, 109, Morton J. said;—"We know of no rule of law or principle of sound policy, which prohibits a person from agreeing or covenanting to convey an estate not his own."

Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact, am I to be allowed to receive 5,000*l.* and interest, because the conveyance is executed, and a bond given for that sum as the purchase-money, when, in point of fact, I had not an inch of the land so sold to sell (e) (1)?" Both these cases, when they arise, will, it is apprehended, deserve great consideration before they are decided in the purchaser's favor. The decision must be the same, whether the money is actually paid or only secured (f) (I).

*40. So if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief. It has even been laid down, that if one sells another's estate without covenant or warranty for the enjoyment, it is at the peril of him who buys, because the thing being in the realty, he might have looked into the title, and there is no reason he should have an action by the law where he did not provide for himself (g) (II).

41. But it may here be remarked, that by the 32 H. 8, c. 9, no person must either buy or sell any pretended title unless the seller or the persons from whom he claims have been in possession of the estate or of the reversion thereof, or taken the rents thereof for a year before the sale, unless the purchaser is in lawful possession, in which case he may buy in any pretended right; and he will not in any case be affected, unless he bought with notice (h) (2).

42. In a late case the statute was pleaded with effect (i). In a recent instance this statute was actually pleaded to a bill for a specific performance, on the ground that the plaintiff himself was only entitled under an agreement for purchase of the estate; but there was no foundation whatever for this defence. It is perfectly

(e) See ch. 6, s. 2, *supra*.

(f) See *post*, ch. 12.

(g) *Roswell v. Vaughan*, 2 Cro. 196; *Lysney v. Selby*, 2 Lord Raym. 1118; *Goodtitle v. Morgan*, 1 Term Rep. 755; and see *Anon.* 2 Freem. 106; and see

and consider *Hitchcock v. Giddings*, 4 Price, 135.

(h) See 4 Rep. 26, a; Bac. Abr. tit. Maintenance, (E.); *Anson v. Lee*, 4 Sim. 364; *Prosser v. Edmunds*, 1 You. & Coll. 481; *Byrne v. Frere*, 2 Moll. 157.

(i) *Hitchins v. Lander*, Coop. 34.

(1) Lord Eldon, in a case before him, expressed considerable doubt upon the doctrines in the case in the Exchequer.

(II) In the bargain and sale of an existing chattel by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold. But the bargain and sale of a chattel *as being of a particular description* does imply a contract that the article sold is of *that description*. *Barr v. Gibson*, 3 Mees. & Wels. 399, *per curiam*.

(1) Ante, 272, note.

(2) See 4 Kent (6th ed.) 446 to 450.

clear that the statute does not apply to such a case. The sale is not of a pretended right or title, but of the estate in fee-simple in possession, subject certainly to the decision of a court of equity upon the right to a specific performance. There are similar cases now in court, and one particularly of great magnitude, in which the sub-purchaser would be happy to avail himself of any objection to get rid of the contract, but it never before occurred to any one to plead the statute. It might with equal force be argued, that a purchaser under an agreement has not a devisable interest, for it is settled, that a mere right of entry is not devisable (1); and this, it may be said, is "a mere pretended right or title (j)." The clear doctrine is, that the purchaser, from the time of the contract, is in equity the owner of the estate, and may devise, sell and dispose of it in the same manner as if the fee were actually conveyed to him (2), *although if equity ultimately refuse a specific performance, the devise, sale or other disposition necessarily falls to the ground. In a late case Lord Eldon reprobated the doctrine. He held clearly, that the sale of an equitable estate under a contract was binding. It was every day's practice. Upon a sale of an interest under a contract, the seller becomes a trustee for the second purchaser, and the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. The Court not only considers it not unlawful, but compels him to permit his name to be used for the benefit of the second purchaser (k). This puts the point at rest (3).

43. It is not champerty in an agreement to enable the *bona fide* purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase (l).

44. And it has been held that the mere assignment to a purchaser of the subject of a suit, is not maintenance. Such an assignment gives to the person to whom it is made a right to institute a new proceeding in order to obtain the benefit of the assignment. But if the assignment contain an indemnity from the purchaser to

(j) See now 1 Vict. c. 24.

(l) *Williams v. Protheroe*, 5 Bing.

(k) *Wood v. Griffith*, 12th Feb. 1818, 309, 3 Yo. & Jerv. 129; see *Scully v. Delany*, 2 Ir. Eq. Rep. 379.

MS.

(1) Rights of entry are, in general, devisable in this country. 1 Jarman, Wills, (2d Am. ed.) 85, [43], in note.

(2) See ante, 191 and note.

(3) The statute against buying and selling pretended titles, does not prohibit the sale and purchase of equitable titles. It does not apply to trust estates. It means legal and not equitable titles. 4 Kent (6th ed.) 449, in note; Allen v. Smith, 1 Leigh, 231; *Baker v. Whiting*, 3 Sumner, 176.

the seller against the expenses which had been incurred or might be incurred by the seller in the prosecution of the suit, the transaction amounts to maintenance, and cannot be enforced (*m*).

45. It may be here proper to mention, that an action on the case for slander of the vendor's title will not lie against a person for giving notice of his claim upon an estate, either by himself or his attorney, at a public auction, or to any person about to buy the estate, although the sale be thereby prevented (*n*) (1); and to sustain the action, malice in the defendant (*o*), and damage to the plaintiff (*p*), must be proved (2).

(*m*) *Harrington v. Long*, 2 Myl. & Kee. 590, *sed qu.* The purchaser appears to have had an indirect object to carry on the suit for other purposes. See *Burke v. Greene*, 2 Ball & Beat. 517; *Moore v. Creed*, 1 Dru. & Walsh, 521.

(*n*) *Hargrave v. Le Breton*, 4 Burr. 2422.

(*o*) *Smith v. Spooner*, 3 Taunt. 246. See *Rowe v. Roach*, 1 Man. & Selw. 304; *Pitt v. Donovan*, *ib.* 639.

(*p*) *Malachy v. Soper*, 3 Bing. N. C. 371.

(1) *Watson v. Reynolds*, 1 Moody & Mal. 1, and notes.

(2) See 2 Greenl. Ev. §428.

*SECTION III.

OF TITLE: IN ACTIONS AT LAW.

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|---|--|
| <ol style="list-style-type: none"> 1. <i>Injunction until Master's report of title.</i> 2. <i>Title to be proved bad.</i> 3. <i>Damages.</i> 4. <i>None for loss of bargain.</i> 5. <i>Hopkins v. Grazebrook.</i> 8. <i>Nor for loss by the funds.</i> 9. <i>Interest on deposit recoverable.</i> 10. <i>And expenses of investigating title.</i> 12. <i>But not preliminary expenses.</i> | <ol style="list-style-type: none"> 13. <i>Right of action in purchaser's personal representative.</i> 15. <i>Costs as between attorney and client.</i> 16. <i>Particular of objections of law.</i> 18. <i>Where purchaser is confined to objection taken before action.</i> 19. <i>Pleading title.</i> 20. <i>Tender of conveyance unnecessary if title bad.</i> 21. <i>Seller restrained from bringing an action after bill dismissed.</i> |
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1. If objections arise to the title, and the vendee bring an action at law for non-performance of the agreement, and the vendor file his bill for a performance *in specie*, and an injunction be granted, the Court will not dissolve it, without the Master's report as to

the title, where the action is brought on the ground of want of title (a).

2. Where a purchaser rests his action on a defect in the title, it is not sufficient to show that the title has been deemed insufficient by conveyancers, but he must prove the title bad (b).

3. If he succeed in proving the title bad, he will, according to the counts upon which he recovers, obtain a verdict either for his deposit or for damages, which in most cases would be regulated by the amount of the deposit.

4. If he declare on the common money counts, he of course cannot obtain any damages for the loss of his bargain; and even if he affirm the agreement by bringing an action for non-performance of it, he will obtain nominal damages only for the loss of his bargain (c), because a purchaser is not entitled to any compensation for the fancied goodness of his bargain which he may suppose he has lost, where the vendor is, without fraud, incapable of making a title (1).

(a) *Church v. Legeyt*, 1 Pr. 301.

1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364; *Clare v. Maynard*, 6 Adol. & Ell. 519; *Bratt v. Ellis*, *Jones v. Dyke*, *supra*, p. 258.

(b) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(c) *Flureau v. Thornhill*, 2 Blackst.

1078; and see 3 Bos. & Pull. 167. See *Brig's case*, Palm. 364; *Clare v. Maynard*, 6 Adol. & Ell. 519; *Bratt v. Ellis*, *Jones v. Dyke*, *supra*, p. 258.

(1) In an executory contract for the sale of land, which the vendor believes to be his own, and where there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same, as it is in the case of an executed sale. See post, 765 in note. If the vendee has paid any part of the consideration, he may recover back the money with interest. But he can recover nothing for the loss of a good bargain. *Peters v. McKeon*, 4 Denio, 546, 550; *Baldwin v. Munn*, 2 Wendell, 399; *Bitner v. Brough*, 11 Penn. State Rep. (1 Jones,) 127; *Allen v. Anderson*, 2 Bibb, 415; *Dumica v. Sharp*, 7 Missouri, 71; *Thompson v. Guthrie*, 9 Leigh, 101; *Herndon v. Venoble*, 7 Dana, 371. See *Fletcher v. Button*, 6 Barbour Sup. Ct. Rep. 646; *Blackwell v. Lawrence Co.* 2 Blackf. 143; *Combs v. Tarlton*, 2 Dana, 464; *Sheets v. Andrews*, 2 Blackf. 274; *Cox v. Strode*, 2 Bibb, 275; *Witherspoon v. Anderson*, 3 Desaus. 247, 248. He cannot recover the expenses of taking possession, or of commencing the cultivation of the land, though he entered pursuant to the terms of the contract. *Peters v. McKeon*, 4 Denio, 546. See *Driggs v. Dwight*, 17 Wendell, 71. But where the vendor has conducted fraudulently and sold land, to which he knew he had no claim, the measure of damages will be the value of the land. *McDonnell v. Dunlop*, Hardin, 41; *Davis v. Lewis*, 4 Bibb, 456. In debt for breach of a bond conditioned for the conveyance of land, and reciting the payment of the consideration, the measure of damages was held to be the value of the land, at the time of the demand for a conveyance. *Hill v. Hobart*, 16 Maine, 164. See *Fletcher v. Button*, 6 Barbour Sup. Court Rep. 646; *M'Kee v. Brandon*, 2 Seammon, 339. A vendor, having title at the time of his agreement to convey, conveyed the land to a third person, after the agreement, and thereby disabled himself from performing his contract, and he was held liable for the value of the land at the time of the breach, with interest from that time. *Wilson v. Spencer*, 11 Leigh, 261; *Dustin v. Newcomer*, 8 Ohio, 49. See *M'Kee v. Brandon*, 2 Seammon, 339; *Letcher v. Woodson*, 1 Brock. 212; *Buckmaster v. Grundy*, 1 Seammon, 310; *Hopkins v. Yowell*, 5 Yerger, 305; *Newson v. Harris*, *Dudley Geo.* 180; *Hopkins v. Lee*, 6 Wheaton, 109; *Connell v. M'Clean*, 6 Harr. & John. 297; *Stephenson v. Harrison*, 3 Litt. 170; *Duncan v. Tanner*, 2 J. J. Marsh. 399; *Rutledge v. Lawrence*, 1 A. K. Marsh. 396; *Shaw v. Wilkins*, 8 Humph. 647.

5. But in a recent case (*d*), where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it by auction, with a stipulation to make a good title by a day named, but which he was unable to do, as the vendor to him refused to convey, it was held, that the purchaser by auction might, beyond his expenses, recover damages for the loss which he sustained by not having the contract carried into effect. Lord Tenterden observed, that upon the present occasion he could only say, that if it is advanced as a general proposition, that where a vendor cannot make a good title, the purchaser shall recover nothing more than nominal damages, he was by no means prepared to assent to it. If it were necessary to decide the point, he should desire to have time for consideration. But the circumstances of this case showed that it differed very materially from that which had been quoted from Sir W. Blackstone's Reports. There the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase-money with interest; here no such offer was or could be made. The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer *some* title, and having entered into a contract to sell, without the power to confer even the shadow of a title, he must be responsible for the damage sustained by a breach of his contract. Mr. Justice Bayley said, that the case of *Flureau v. Thornhill* was very different from this, for here the vendor had nothing but an equitable title. Now where a vendor holds out an estate as his own, the purchaser may presume that he has had a satisfactory title, and if he holds out as his own that which is not so, he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted (*1*).

6. This case is one of great importance, and will, I fear, tend to much litigation before the distinction which it introduces is thoroughly understood.

7. In the later case of *Walker v. Moore* (*e*), where after the contract the abstract was delivered and showed a good title, but it had not been examined with the deeds; and the purchaser resold the

(*d*) *Hopkins v. Grazebrook*, 6 Barn. & Cress. 31; 9 Dowl. & R. 22. (*e*) 10 Barn. & Cress. 416.

(1) See *Peters v. McKeon*, 4 Denio, 546; *Driggs v. Dwight*, 17 Wendell, 71; *Fletcher v. Button*, 6 Barbour Sup. Court Rep. 616.

estate at a profit, and then upon an examination of the deeds it *appeared that the title was defective, and he had to pay to the second purchasers the costs of investigating the title; it was held that the original purchaser could not recover from the original seller the costs of the resale or the costs paid to the second purchasers, or any damages for the loss of the bargain. The case of *Hopkins v. Grazebrook* was said to be very different from this. There the defendant had sold property as his own which was not so, and the Court was of opinion that the defendant being in fault, by representing himself as the owner of the property, the plaintiff's right was not restrained to nominal damages. Here the defendants undertook to make a good title, and they might honestly think they should be enabled to do so (1). The right to damages generally was held to be concluded by *Flureau and Thornhill*. And as to the expenses upon the resale, as there was no fraud, negligence in preparing the abstract was the only thing that could be imputed to the sellers, and the purchaser by exercising ordinary care might have averted the loss that had arisen from that negligence. It is usual and reasonable, before any expense is incurred, to examine the abstract with the deeds, and the purchaser ought not to recover expenses which he had sustained by reason of his having contracted to resell the premises before he had taken the trouble to ascertain whether the abstract was correct or not.

But one of the Judges expressed his opinion, that if the abstract had been examined with the deeds and found correct, the purchaser might perhaps have been justified in acting on the faith of having the estate, and if after that time he had made a sub-contract, the learned Judge thought he would have been entitled to recover the expenses attending it, if it failed in consequence of any defect in the title of his vendor. And further, if there were *mala fides* in the original vendor (but not otherwise), he was not prepared to say that the purchaser might not recover the profits which would have arisen from the resale (2).

8. But in a case of this nature a purchaser is not entitled to any compensation, although he may be a loser by having sold out of the funds (f).

(f) *Flureau v. Thornhill*, 2 Blackst. 1678.

(1) See *Bitner v. Brough*, 11 Penn. State Rep. (1 Jones,) 127.

(2) See *Adams v. McMillan*, 7 Porter, 73; *Peters v. McKeon*, 4 Denio, 516; *Bitner v. Brough*, 11 Penn. State Rep. (1 Jones,) 127; *McDonnell v. Dunlop*, Hardin, 41.

9. He is, however, entitled to interest on his deposit (*g*) ; and if the residue of the purchase-money has been lying ready without interest being made by it, he is entitled to interest on that (*h*) (1).

10. Where the plaintiff declares on the original contract, and *lays the expenses incurred in investigating the title, &c. as special damages, he will be entitled to recover them as such (*i*). In one case Lord Ellenborough threw out a doubt upon this (*k*) ; but in a subsequent case before him, in which Gibbs, C. J., then at the bar, was counsel for the vendor, the defendant, a purchaser, obtained a verdict for his deposit with interest, and the *expenses of investigating the title*, without argument, it being admitted that the title was defective (*l*) ; in a still later case, they were also recovered by a purchaser (*m*) ; and there are other cases not reported, in which I am told such expenses have been recovered. If the rule were otherwise, it would induce many persons upon speculation to offer an estate for sale, knowing the title to be bad ; and yet, in a case at *nisi prius*, Mansfield, C. J. held, that the purchaser was not entitled to recover back the expenses of investigating the title (*n*) (2).

11. But clearly the expenses cannot be recovered under a count for money had and received ; and Lord Ellenborough has decided that they cannot be recovered under a count for money paid, &c. to the defendant's use, as the money is expended for the purchaser's own satisfaction as to the title which he is about to take (*o*). Nor can the expenses of investigating the title be recovered from the auctioneer (*p*). And where the contract is by parol, although the deposit may be recovered, expenses of investigating the title cannot (*q*). The expense of preparing the conveyance can hardly in any case be recovered, for it should not be prepared before the title is accepted (*r*) ; but the expense would be recoverable if the seller

(*g*) See ch. 1^o, *infra*.

(*h*) *Flureau v. Thornhill*, *ubi sup.* ; *Hodges v. Lord Litchfield*, 1 Bing. N. S. 492.

(*i*) *Flureau v. Thornhill*, *ubi sup.* ; *Richards v. Barton*, 1 Esp. Ca. 268 ; *Bratt v. Ellis* ; *Jones v. Dyke*, App. Nos. 4 & 5.

(*k*) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(*l*) *Turner v. Beaurain*, Sitt. Guildh. cor. Lord Ellenborough, C. J., 2d June 1806. MS.

(*m*) *Kirtland v. Pounsett*, 2 Taunt. 145.

(*n*) *Wilde v. Fort*, 4 Taunt. 334. Note,

the C. J. also ruled, that interest on the deposit is not recoverable, which is contrary to other authorities ; and too large a construction, according to other authorities, appears to have been put on the statute of Elizabeth.

(*o*) *Camfield v. Gilbert*, 4 Esp. Ca. 221.

(*p*) *Lee v. Munn*, 1 Holt, 569.

(*q*) *Gosbell v. Archer*, 4 Nev. & Mann. 485.

(*r*) *Jarman v. Eglestone*, 5 Carr. & Pay. 172 ; *Hodges v. Lord Litchfield*, 1 Bing. N. C. 492 ; *post*, ch. 13, s. 1, pl. 5.

(1) See *post*, 793, 794.

(2) See *Lee v. Dean*, 3 Wharton, 316 ; *Bitner v. Brough*, 11 Penn. State Rep. (1 Jones,) 127.

had withheld notice of an incumbrance, the existence of which prevented the completion of the purchase.

12. Nor can a purchaser recover expenses preliminary to the contract. The party enters into them for his own benefit at a time when it is uncertain whether there will be any contract or not. Neither will he be allowed the costs of a survey which he should defer till he know whether or not a good title can be made. But he may recover the charges for searching for judgments, and for comparing the abstract with the deeds, for unless judgments are *searched for at an early period, great expense may afterwards be incurred unnecessarily ; and for the same reason, the comparison of deeds with the abstract should be made early (*s*).

13. In a case where a purchaser's counsel required certain things to be done, which put the seller to trouble and expense in clearing the title of difficulties, and afterwards suggested an objection, which was held a fatal one, and the seller's bill for a specific performance was dismissed, Lord Eldon expressed an opinion, that the seller ought to be repaid the preliminary expenses, and expressed his hope, that the seller would not be put to agitate his right to recover what he had expended, upon which the purchaser appears to have agreed to reimburse that expense (*t*). This seems to have led to an opinion, that a seller could recover such expenses, but there appears to be no foundation for such a claim, as the seller has broken his agreement, and is himself liable to an action for damages, whatever might be the measure of those damages.

14. If the seller fail to make out a good title, and the purchaser die, his personal representative, and not his heir, is entitled to maintain an action for damages for loss of interest on the deposit, and for the expenses incurred by investigating the title, for in such a case there is a personal contract, a breach of it in the life-time of the purchaser, and a loss to the personal estate (*u*).

15. If a bill be filed by the seller for a specific performance, and it is dismissed with costs, the purchaser cannot recover at law the costs as between attorney and client, ultra the costs as between party and party taxed and paid to him in the suit in Chancery (*v*).

16. Where a vendee brings an action on account of the agreement not having been completed, he will not be compelled to give

(*s*) *Hodges v. Lord Litchfield*, 1 Bing. N. S. 492.

(*t*) *Deverell v. Lord Bolton*, 18 Ves. jun. 514, 515.

(*u*) *Orme v. Broughton*, 1 Moo. & Scott, 417; 10 Bing. 533.

(*v*) *Hodges v. Lord Litchfield*, *ubi sup.*

the vendor a particular of any of the objections in point of law arising upon the abstract (*y*).

17. And where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other, which may entitle him to recover as for breach of the agreement (*z*).

18. Lord Tenterden, C. J., however, ruled at *nisi prius*, that where a particular objection in point of law only was taken by the purchaser before the action, he must at the trial confine himself to that objection, and could not rely upon another objection, which *if stated might have been remedied*. The case was a strong one, as the objection did not appear upon the face of the abstract: the abstract stated a deed as executed by the assignee of a bankrupt, who had been previously interested in the property, whilst in fact the deed was not executed, but it was proved that the assignee was ready to execute it (*a*).

19. To entitle a vendor to sustain an action for breach of contract, it has been said, that he must show what title he has; it not being sufficient to plead that he has been always ready and willing, and frequently offered to make a title to the estate (*b*). In a late case (*c*), however, where a vendor averred, *that he was seised in fee*, and could make a good and *satisfactory* title to the purchaser of the estate, by the time specified in the conditions of sale, it was held sufficient, and that it was not necessary for him to show how he deduced his title to the fee. And the Court seemed of opinion, in opposition to the prior cases, that a vendor need not display his whole title on the record. This decision, without working an injustice, will in most cases render it unnecessary to load the pleadings with the title of the vendor (*1*).

20. Although a purchaser is expressly required to prepare a conveyance, yet if a bad title be produced, he may maintain an action for recovery of his deposit without tendering a conveyance (*d*).

(*y*) *Collet v. Thomson*, 3 Bos. & Pull. 415.
246.

(*z*) *Squire v. Tod*, 1 Camp. Cas. 293.

(*a*) *Todd v. Hoggart*, 1 Mood. & Malk. 128.

(*b*) *Philips v. Fielding*, 2 H. Blackst. 123; and see *Duke of St. Albans v. Shore*, 1 H. Black. 270; *Luxton v. Robinson*, Dougl. 620; see 2 Nev. & Mann.

(*c*) *Martin v. Smith*, 6 East, 553; 2 Smith, 543; and see Co. Litt. 305, b.; *Terry v. Williams*, 1 Moore, 498; *Hal-
lewell v. Morrell*, 1 Mann. & Grang. 367.

(*d*) *Seward v. Willock*, 5 East, 198; S. P. ruled by Lord Ellenborough, C. J., in *Lowndes v. Bray*, Sitt. after T. T. 1810.

(1) See *Boyer v. Porter*, 1 Tenn. 258; *Metcalfe v. Dallam*, 1 J. J. Marsh. 200.

21. Where a bill by a seller for a specific performance is dismissed, and it is not added that it is without prejudice to the plaintiff's remedy at law, equity will in a proper case restrain the seller from afterwards bringing an action for damages; for example, where the bill was dismissed because the seller had no title (*e*) ; and where a party to a bill which is dismissed is declared to be at liberty to bring an action, yet no reliance can in a court of law be placed upon that permission; the judge does not draw the declaration, neither do judges give an opinion upon that which is not before them (*f*) (1).

(*e*) M'Namara v. Arthur, 2 Ball & Beat. 349.

(*f*) See 3 Taunt. 438, *per* Mansfield, C. J.

(1) See 2 Daniell Ch. Pr. (Perkins's ed.) 1200, 1201.

*CHAPTER IX.

OF THE ABSTRACT, AND OF THE PRODUCTION OF DEEDS ; OF COVENANTS TO PRODUCE THEM, AND OF ATTESTED COPIES.

SECTION I.

OF PREPARING AND EXAMINING ABSTRACTS.

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| 3. <i>Abstract of ancient deeds cannot be required.</i> | 27. <i>Provisoos for cessor.</i> |
| 4. <i>How it should be written.</i> | 28. <i>Trusts.</i> |
| 6. <i>Heading.</i> | 29. <i>Powers.</i> |
| 7. <i>What deeds should be abstracted.</i> | 30. <i>Covenants.</i> |
| 8. <i>Lessor's title.</i> | 31. <i>Executions : attestations.</i> |
| 9. <i>Exchanged estate.</i> | 32. <i>Receipt.</i> |
| 10. <i>Allotments under inclosures.</i> | 33. <i>Registry.</i> |
| 11. <i>Printed copies of act.</i> | 34. <i>Intestacy.</i> |
| 13. <i>Exchange of common field lands.</i> | 35. <i>Leasehold title.</i> |
| 14. <i>Copyholds enfranchised.</i> | 36. <i>Renewable leaseholds.</i> |
| 15. <i>Allotment for several estates.</i> | 37. <i>Attendant terms.</i> |
| 16. <i>Separate purchases.</i> | 38. <i>Descent.</i> |
| 17. <i>Margin.</i> | 39. <i>Wills.</i> |
| 18. <i>Description of parties.</i> | 40. <i>Acts of Parliament.</i> |
| 19. <i>Recitals.</i> | 41. <i>Judgments and crown debts.</i> |
| 20. <i>Witnessing part.</i> | 42. <i>Decrees.</i> |
| 21. <i>Granting part.</i> | 43. <i>Fiats in bankruptcy.</i> |
| 22. <i>Parcels.</i> | 44. <i>Liability of seller's solicitor.</i> |
| 23. <i>One abstract for several estates.</i> | 45. <i>Purchaser's solicitor to examine the abstract.</i> |
| 24. <i>Exception.</i> | 46. <i>Where examination may be delayed.</i> |
| 25. <i>Habendum.</i> | 47. <i>Solicitor perusing abstract.</i> |
| 26. <i>Limitations and uses.</i> | |

1. I PROPOSE in this place to make a few practical observations on, 1, the mode in which an abstract should be prepared ; 2, the manner in which it should be examined ; and 3, the way in which it should be perused. Mr. Preston has exhausted this subject in his able treatise on abstracts of title. His work and my own experience will enable me to assist the reader without at all rendering a reference to his elaborate work unnecessary.

2. Formerly the title-deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense, and the abstract was compared with the title-deeds by the counsel *before whom it was laid (a). But the seller's solicitor now prepares the abstract at his expense, and the purchaser's solicitor examines the abstract with the deeds at the purchaser's expense. And a purchaser may insist upon an abstract, and is not bound to wade through the deeds. Where a seller undertakes to produce an abstract, and in his declaration avers that he has done so, that allegation will not of course be sustained by proof that he delivered the deeds themselves to the purchaser (b).

3. A seller may upon a suit for a specific performance be compelled on oath to bring into the Master's office *all* documents in his possession or power relating to the title, and would not be entitled to withhold them from the purchaser if he required them, yet clearly he is not bound to furnish an abstract commencing before the proper period, whether the purchase is completed in or out of Court. Where circumstances disclosed by the instruments abstracted or otherwise known to the purchaser require the production of any portion of the earlier title, the true rule perhaps is, that the seller must furnish an *abstract* of any instrument, however ancient, upon the contents and construction of which the title depends, but that where the instrument is required simply to establish a fact or to negative an inference, it is sufficient to produce the instrument itself as such evidence.

4. The abstract should be fairly written on the usual paper (c). No part of the counsel's attention should be distracted by having to make out the handwriting, or by the difficulty of turning over the sheets where they are very large and thin. In my practice as a conveyancer I many times refused to peruse papers illegibly written, or written upon such thin large paper that a long abstract could not be conveniently perused. It is of great importance to a purchaser that no unnecessary impediment should be thrown in the way of his counsel, who will require all the powers of his mind for the close and continued investigation of a long and complicated abstract of title.

5. In Ireland an abstract is accompanied with copies of the deeds, to which the counsel is separately referred, and he states at the end of every reference that he has perused the copy (d).

(a) See *Temple v. Brown*, 6 Taunt. 60.

(b) *Horne v. Wingfield*, 3 Scott's N. C. 340.

(c) 1 Prest. Abstr. 75.

(d) See p. 78.

6. Every abstract should state in the heading whose title it is, and for what interest; and when it is laid before counsel a copy of the agreement or conditions of sale should be sent with it.

7. We shall hereafter consider at what period the title should *commence (*e*), and the solicitor should be guided by the established rule in preparing an abstract. He should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins the root of the title, he ought to abstract *every* subsequent deed, and if he were to suppress any by which the purchaser should be damnified, he would be answerable for the loss. But there is no pretence for a purchaser requiring, or a seller's solicitor furnishing an abstract of all the deeds in his possession, however ancient: this is never done by a respectable solicitor, and could not be justified, nor could a purchaser insist upon such an abstract.

8. Where the title is to a leasehold interest, and the seller has not protected himself from producing the lessor's title (*f*), an abstract of the freehold as well as of the leasehold title must be furnished.

9. If the estate has been taken in exchange, an abstract must be furnished of the title as well of the estate sold, as of that which was given in exchange for it (*g*).

10. Lands allotted under inclosure acts become liable to the uses of the estates in respect of which they were allotted, and it is therefore upon the sale of such lands necessary to furnish an abstract of the title to the original estates (*h*).

11. So upon exchanges under inclosure acts, for the title remains the same, although it applies to the new, and not to the old estate. It is generally expressly provided by inclosure acts, that the estates taken in exchange shall become liable to the uses of the estates given in exchange, and there is no pretence, although negative words are not introduced, for contending that the *former* title of the estate taken in exchange any longer affects it. The general inclosure act contains no stipulation expressly making the new estate liable to the uses of the old one (*i*); but still the operation of the law would clearly be the same, and there is no reason why in this, any more than in the other case, the estates should remain

(*e*) *Infra*, ch. 10.

(*f*) Ch. 10, *post*.

(*g*) *Bastard's case*, 4 Rep. 121; see 8 & 9 Vict. c. 106, s. 4.

(*h*) See 1 Prest. Abstr. 87, 161.

(*i*) 41 Geo. 3, c. 109. See 3 & 4 Will. 4, c. 87, for remedying defects for want of enrolment of awards; *Casamajor v. Strode*, 2 Myl. & Kee. 706.

liable to the uses to which they were originally subject. So that in every such case the title of the party holding such estate is the only one which relates to it.

12. In titles under inclosure acts, a printed copy of the act should be furnished, and the abstract, as far as it relates to the *inclosure, should contain only a reference to the act, with an official extract from the award (*k*).

13. The power to exchange lands in common fields is expressly guarded by clauses changing the uses of the lands, and taking away any right of eviction after the exchange (*l*).

14. If the estate was copyhold and has been enfranchised, an abstract of the lord's title to the freehold will be required, as well as of the copyholder's title to the copyhold before its extinguishment (*m*). The copyhold title, whilst the transaction is a recent one, is still necessary, because unless it was a valid one, the copyhold might yet be recovered, and the freehold title is just as necessary as if the estate had never been copyhold, because the title as freehold will altogether depend on the validity of the lord's title.

15. Where an allotment is made generally in respect of all the tenant's lands, it is necessary to make out a title to them all; and in some cases where the original estates are held under conflicting settlements, it may be found impossible to do so (*n*).

16. Where an estate has been purchased in parcels under different titles, every title should of course be traced separately, until they all unite in one common title.

17. The general mode of abstracting is to have several inner margins, so as to draw attention at once to the different parts of the instruments, and particularly the parcels or description of the estate are inserted in the innermost margin, and frequently this, which is a convenience to the counsel who peruses the abstract, is abused, and only half the sheet is occupied. An abstract should always have the common, which is a large margin, and all conversant with the subject will agree, that this margin should be left for the counsel unincumbered by any observations by the solicitor not strictly necessary.

18. Now, as to the mode of abstracting a deed. The parties

(*k*) See 8 & 9 Vict. c. 113, s. 3.

(*l*) 4 & 5 Will. 4, c. 30, s. 24, 25.

(*m*) 1 Prest. Abstr. 205.

(*n*) See King v. Moody, 2 Sim. & Stu. 578.

should be stated, with their descriptions, shortly, if deemed necessary.

19. The recitals should also be stated of the deaths, failure of issue, and the like, which frequently renders further evidence of those facts unnecessary, and sometimes leads to incumbrances, or the like, the instrument creating which is not with the deeds (*o*). Recitals should be introduced as such where they occur, and *not as substantive statements of fact. The deeds, &c., already abstracted, may be stated to be recited, but an abstract of the recitals could not be justified.

20. The witnessing part is always introduced as such. It should state the consideration, and the motive or object of the parties where that is set forth (*p*).

21. The granting part should be stated in the very words, but of course not repeating them; and the exact words used in conveying the estate unto the grantee, &c., should be stated.

22. The parcels should be stated accurately, but not at unnecessary length; and they should, in subsequent instruments, only be referred to, unless a new or some additional description is introduced, which should be stated (*q*).

23. It is not an unusual practice, where a large estate is sold in lots, to prepare one abstract including all the parcels, and to furnish every purchaser with a copy of it, merely distinguishing the description of his lot, and sometimes leaving him to discover it. This is an abuse for the sake of charging, and adds to the purchaser's expense in fees to counsel and payments to his solicitor, as well as to the seller's expense. It is a disreputable practice.

24. Any exception in the deed relating to the property sold, should, of course, be abstracted (*r*).

25. The habendum should be stated in the very words as regards the grantee, his heirs, &c., and it will then appear whether the habendum is simply unto the grantee and his heirs, &c., or unto and to the use of him, &c. Upon this point the person abstracting should not exercise his judgment, but copy the words (*s*).

26. The limitations and uses should be accurately stated. Where the *common* words are accurately introduced, the effect of them only should be stated (*t*): *estates tail*, therefore, should be stated

(*o*) 1 Prest. Abstr. 63, vol. 3, p. 8,
229; see *Gillett v. Abbott*, 7 Adol. &
Ell. 783.

(*p*) 1 Prest. Abstr. 69.

(*q*) 1 Prest. Abstr. 56, 81, 90, 94, vol.
3, p. 31, 40, 212.

(*r*) 3 Prest. Abstr. 36.

(*s*) 1 Prest. Abstr. 97, vol. 3, p. 39.

(*t*) 1 Prest. Abstr. 99, 104, 117, 121.

as such, and the precise words of limitation not introduced ; but every limitation out of the common course, and every proviso defeating or abridging any limitation, should be accurately stated. Where the provisos are, although complicated, yet common ones, and the event provided for has not happened, they should only be referred to ; for example, a proviso for shifting the estate from the elder branch to the younger, if the former should acquire another estate, should be stated in a few words where it never operated ; but it should not be altogether omitted although the event did not arise.

*27. Provisoes for cessers of terms, where they are considered to have operated, should be fully stated (*u*).

28. If there are any trusts they should be stated, with all the conditions and requisitions attached to them, unless they never arose, in which case the fact should be stated, and the trusts simply referred to.

29. Powers should be stated shortly, unless they have been exercised, as in the case of a power of sale and exchange, or power to appoint new trustees, the material parts of which should be stated where it has been executed. A power to lease seldom requires to be more than referred to. So powers to trustees to give receipts need only be stated in those words, unless where the purchaser is to pay his money under that authority. Where there is such a power, the trusts of the money are not to be stated (*x*), or only shortly.

30. The usual covenants, for example, the common covenants for title, should be referred to as such, but any special matter should be abstracted. Frequently the covenants disclose incumbrances not noticed elsewhere. Covenants to produce deeds in like manner contain references to deeds not with the title. The seller's solicitor is bound to abstract them fairly (*y*).

31. When the instrument is fairly abstracted, it should be stated with accuracy by whom it is executed (*z*), and if by attorney, that fact should be stated, and the power should be abstracted shortly. Where livery of seisin—as upon a feoffment, or enrolment, as upon a bargain and sale—is required, the fact and date should be correctly stated (*a*). If the deed be in execution of a power requiring

(*u*) Ch. 15, *infra*.

(*x*) 1 Prest. Abstr. 134, 135. See now 8 & 9 Vict. c. 112.

(*y*) 1 Prest. Abstr. 152, vol. 3, p. 56.

(*z*) 1 Prest. Abstr. 154, 276.

(*a*) See now 7 & 8 Vict. c. 76 ; 8 & 9 Vict. c. 106.

witnesses, the form of the attestation and the number of witnesses should be stated (*b*).

32. Where a receipt is endorsed, that should be stated, and by whom it is signed (*c*).

33. If the estate is in a register county, the fact of registry should be regularly stated (*1*).

34. In cases of intestacy of freehold estates, it is desirable to state how the intestacy is proved, as, for example, by letters of administration, which are the best proof. And generally all the evidence in support of facts recited or stated should be referred to. It will be sure to be inquired for if not referred to, and that leads to additional labor and expense.

*35. In abstracts of title to leaseholds, the deduction should be regularly made out from the original lease by the assignments or by recitals, which in some cases will supply the loss of assignments (*d*), and by probates and letters of administration in courts of competent jurisdiction (*e*).

36. In the case of renewable leaseholds, it must be shown how the old leases for a reasonable period were settled, in order to prove that the new leases are not affected by any equity (*f*).

37. The creation of terms of years assigned to attend the inheritance should be shown by the abstract, but the intermediate assignments may be abstracted very shortly (*g*).

38. In cases of a title by descent, the best proof by letters of administration, leases, assessments to land-tax or the like, should be obtained, but hereafter titles within the range of the late statute (*h*) will not require to be carried back in order to show who was the first purchaser (*i*). But in every case a regular pedigree should be produced properly vouched.

39. In abstracting wills, where the usual technical terms are not used, it is necessary to state the exact terms of the devise, and all modifications of it, by proviso or otherwise, should be accurately stated (*k*).

40. Acts of parliament generally may be concisely stated, be-

(*b*) 3 Prest. Abstr. 371.

(*c*) 1 Prest. Abstr. 72, 155, 299.

(*d*) Ch. 10, *post*; see *Doe v. Maple*,
3 Bing. N. C. 832.

(*e*) 1 Prest. Abstr. 11.

(*f*) Ch. 10, *post*; 1 Prest. Abstr. 14.

(*g*) 1 Prest. Abstr. 25, 148, *post*. See
now 8 & 9 Vict. c. 112.

(*h*) 3 & 4 Will. 4, c. 106, *post*, ch. 11.

(*i*) 1 Prest. Abstr. 22, 43.

(*k*) 1 Prest. Abstr. 178.

(1) The statutes of the several States require the record of deeds of land in all cases. 4 Kent (6th ed.) 456; 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, Ch. 29, §1, note, §20 note, 4 vol. p. 545, 555.

cause there is mostly a printed copy with the title which can be read with facility, and may therefore with propriety be sent with the abstract and referred to.

41. Judgments, crown debts, and the like should be stated succinctly. This, however, is seldom done, but the purchaser is left to discover such incumbrances by search or inquiry; but now that judgments are made an actual charge upon the property, it may not be safe for the seller's solicitor to withhold a statement of them (*l*).

42. No particular directions can be usefully given as to decrees. The nature of the question will point out whether it is necessary to do more than abstract the date, parties, and declaratory part of the decree. Where there is a reference to the Master important to the title, the result should be stated, with the order or decree on further directions (*m*).

43. Commissions of bankrupt, or fiats in bankruptcy, are usually *stated shortly, and if the bankruptcy is of recent date, and the bankrupt do not concur in the conveyance by his assignees, the purchaser's solicitor inspects the proceedings as to the trading act of bankruptcy, &c. (*n*). Now the property vests in the assignees for the time being without any conveyance (*o*).

44. We have already seen that the seller's solicitor would be personally responsible for suppressing an incumbrance (*p*). And whilst preparing an abstract he cannot be too careful in furnishing the purchaser with the real state of the title.

45. The purchaser's solicitor is bound to examine the abstract with the deeds (*q*), and if he were by negligence to overlook an important provision by which his client should be damnified, he would be answerable for the loss. The examination of an abstract ought never to be left to an incompetent person: all that such a person can do is to see that what is abstracted is correctly stated; he can form no opinion of the materiality of what is omitted in the abstract, and yet one great point is to look through the whole of the instrument in order to ascertain that there is no proviso or declaration, or limitation over, which qualifies or restricts the portion of the instrument abstracted; and the description of the parties, or an exception in the operative part of the deed.

(*l*) Ch. 12, *post*.

(*m*) 1 Prest. Abstr. 188.

(*n*) 1 Prest. Abstr. 167.

(*o*) 1 & 2 Will. 4, c. 56, s. 26.

(*p*) Introd. chapter.

(*q*) Sect. 3, *post*.

or frequently in the covenants for title, leads to incumbrances or settlements which have not been disclosed. In the case of wills, particularly, the solicitor is bound to read through the whole will. Upon him devolves the duty of seeing that the evidence is what it purports to be, and that the deeds and wills are duly attested, and the receipts on the deeds properly endorsed and signed. An estate has been lost principally from the manner in which the receipt was endorsed, which would have led a vigilant purchaser to inquire further, when he would have discovered the fraud which had been committed (*r*). He should also see that the modern deeds are duly stamped (*s*).

46. If the abstract is on the face of it properly framed, which a competent person will be able to tell at a glance, the examination of it may be delayed until after the abstract has been perused by counsel, when he can at once ascertain the correctness of the abstract, and investigate the points suggested by the counsel (*t*).

*47. Sometimes a solicitor enters into a discussion upon a title, which generally ends by a reference to counsel, and often by a Chancery suit. Unless a solicitor is competent to direct his client throughout, a recourse to counsel at once will save both time and money.

(*r*) *Kennedy v. Green*, 3 Myl. & Kee.
699.

(*s*) 1 Prest. Abstr. 201.
(*t*) See sect. 2, *post*.

SECTION II.

OF PERUSING ABSTRACTS.

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| 1. <i>Perusal at one sitting.</i> | 13. <i>Searches.</i> |
| 3. <i>Notes.</i> | 14. <i>Court rolls.</i> |
| 4. <i>Opinion book.</i> | 15. <i>Expense of searches.</i> |
| 5. <i>How to be perused.</i> | 16. <i>Power of attorney.</i> |
| 6. <i>Parcels.</i> | 17. <i>Evidence.</i> |
| 7. <i>Dates : new laws.</i> | 18. <i>Pedigrees.</i> |
| 8. <i>Evidence.</i> | 19. <i>Recitals of pedigree.</i> |
| 9. <i>Office copies, extracts, probates, &c.</i> | 20. <i>Evidence of pedigree.</i> |
| 10. <i>Pedigree : certificates : receipts.</i> | 21. <i>Registries of birth.</i> |
| 11. <i>Registry : enrolment : execution :
attestation.</i> | 22. <i>Marriage : legitimacy.</i> |
| 12. <i>Negative answers.</i> | 23. <i>Seller's evidence.</i> |
| | 24. <i>Broker's certificate.</i> |

1. In regard to the best mode of perusing an abstract by counsel
[*438]

opinions differ, and I will not presume to decide (*y*). But I will simply state what always appeared to me the best mode.

2. In the first place the perusal should, if the length of the abstract will permit of it, be finished at one sitting, although any difficult point of law, the whole bearing of which is ascertained, may properly be reserved for further and separate consideration.

3. It is not useful to make many notes, for they often distract the attention. In one instance a counsel, in perusing an abstract, actually inserted a note in the margin opposite to a deed with a serious defect, stating it to be what it ought to have been, and so the objection was missed. His mind was engaged in making the note, and as he knew how the instrument ought to have been framed, he inserted what was not contained in the abstract,—a fatal error, but one not unlikely to occur in a moment of absence.

4. Still a man should not incumber himself with unnecessary *details. He may save himself much unnecessary labor by a little method. He should have a book in which he should write his opinion, and there should be a margin. He should write his opinion as he proceeds, reserving, if necessary, any important point for subsequent consideration. In the margin he should note every term of years created, and every assignment of it; thus

1,000 years	-	-	-	-	-	-	-	fol. 6.
								fol. 18.
								fol. 30.

Nothing more is requisite where there is a regular deduction, and he can at once, when he comes to deal with the terms, refer to the title to them separately. Where there is a long deduction of a legal estate of inheritance, he may pursue the same method. If the title be complicated, he may leave a blank page in his book for references to the abstract, and queries to be considered. With some such exceptions he will find it the best and surest method of arriving at a just conclusion, to trust to his view of the title on the face of the abstract itself, without incumbering himself with or relying upon notes.

5. It may sometimes be useful to glance the eye over the abstract in the first place, in order to obtain a general view of the title, and experience will rapidly point out when a subsequent part of the abstract may be looked into advantageously before its proper turn; but, speaking generally, an abstract should be

perused but once, and that once effectually. The party should never pass on until he thoroughly comprehends what he has already read; the advancing in a difficult title, in order to comprehend what you have passed and do not understand, often leads to insurmountable difficulties.

6. It is the duty of counsel to see that the parcels are correct in the several instruments, and this particularly should be followed up, step by step, when the descriptions can often be detected and reconciled, whilst upon a *general view* of them it may be deemed impossible to connect them.

7. In perusing an abstract, it should not be taken for granted that the dates are chronologically arranged, but the fact should be ascertained, although this will not, as to new titles, often be important now that a will is allowed to operate on after-acquired property (*z*). And now counsel should keep constantly in view the recent statutes altering the law of dower (*a*), descent (*b*), *wills (*c*), escheat (*d*), illusory appointments (*e*), executors (*f*), the substitution for recoveries act (*g*), the new statute of limitations (*h*), the new acts for amending the law of real property (*i*), and the act to render the assignment of satisfied terms unnecessary (*j*). In most cases he will have to consider the early title with reference to the old law, and the recent title with reference to the new, and some caution will be necessary not to confound them or the periods over which they operate; and the provision made by statute in favor of purchasers as regards voluntary settlements, and settlements with power of revocation (*k*), recoveries (*l*), unregistered deeds (*m*), bankruptcy (*n*), judgments (*o*), crown debts (*p*), should also be kept in view.

8. Counsel as he proceeds in perusing the abstract, should call, in the margin, for evidence of facts which he supposes will readily be produced; for example, letters of administration, as evidence of intestacy; office extracts from wills, to prove the appointment of executors and probate by them, as such inquiries in the margin will enable him to confine his opinion to points of importance.

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| (<i>z</i>) Ch. 11, sect. 3, <i>post</i> . | s. 4. |
| (<i>a</i>) 3 & 4 Will. 4, c. 105, <i>post</i> , ch. 11, | (<i>h</i>) 3 & 4 Will. 4, c. 27, <i>post</i> , ch. 11 s. 5. |
| s. 1. | (<i>i</i>) 7 & 8 Vict. c. 76; 8 & 9 Vict. c. 106. |
| (<i>b</i>) 3 & 4 Will. 4, c. 106, <i>post</i> , ch. 11, | (<i>j</i>) 8 & 9 Vict. c. 112. |
| s. 2. | (<i>k</i>) Ch. 21, s. 1, <i>post</i> . |
| (<i>c</i>) 1 Vict. c. 26, <i>post</i> , ch. 11, s. 3. | (<i>l</i>) <i>Ib.</i> s. 7. |
| (<i>d</i>) 4 & 5 Will. 4, c. 23. | (<i>m</i>) <i>Ib.</i> s. 5. |
| (<i>e</i>) 1 Will. 4, c. 46. | (<i>n</i>) <i>Ib.</i> s. 3. |
| (<i>f</i>) 1 Will. 4, c. 40. | (<i>o</i>) <i>Ib.</i> s. 4. |
| (<i>g</i>) 3 & 4 Will. 4, c. 74, <i>post</i> , ch. 11, | (<i>p</i>) <i>Ib.</i> s. 9. |

9. So where the original documents cannot be obtained, he should, as he proceeds, require to be produced, the probate or an office copy of a will affecting a real estate, but not a resort to the original will without some strong ground for suspicion. If it has not been proved, which a will of real estate need not be⁽¹⁾, of course the will itself should be produced. He should also call for office extracts from fines and recoveries, and from awards under inclosure acts, and an attested copy, examined with the roll, of an act not made a public one, or a printed copy of it made evidence (g). Where the estate is leasehold, or the title is to be shown to a term of years carved out of the inheritance, which he must consider in point of title as a leasehold, the probate is the proper evidence, for the will itself is insufficient, or an office extract if the probate cannot be obtained. In a title to an attendant term, it is rarely that the probate can be obtained. He must also see that the probates or letters of administration issued out of the proper court, and that the chain of representation is not broken, for an administration to *an executor will not carry on the title any more than an executorship will to an administrator.

10. So certificates of marriages, births, baptisms, should be required to verify a pedigree, and certificates of burial to prove the deaths of parties, and the last receipt or other sufficient evidence of the payment of an annuity or jointure which has recently ceased by the death of the party entitled (r).

11. As counsel proceeds, he should, where the fact is not stated, inquire in the margin whether the deeds in a register county have been registered, which will be proved by the certificate indorsed: whether bargains and sales have been enrolled within six lunar months, which will be proved by the indorsement; whether instruments executed under powers have been executed properly, and he should point out in the inquiry the proper mode of execution; for example, "I presume this deed is attested by two witnesses, and that the attestation contains the words signed and sealed." And in future he must inquire whether wills made in execution of a power since the 1 Vict. c. 26, are attested by two witnesses, and whether they were executed whilst both were present; he should

(g) See *Brett v. Beales*, 1 Mood. & Malk. 421; *Baumont v. Mountain*, 10 Bing. 404. (r) See *Wynn v. Williams*, 5 Ves. jun. 130.

(1) It is otherwise in many of the United States. 1 Jarman, Wills, (2d Am. ed.) 211, 212.

never rely upon the statement in an abstract, that the instrument was duly executed, but he should inquire into the requisite ceremonies, unless it is a common deed, in which case he may be content with the statement.

12. He should also make inquiries in the margin as he proceeds, for the purpose of obtaining an answer in the negative; for example, a power to charge a sum of money is stated in abstracting a settlement, but no trace of its having been executed appears in the abstract. The inquiry should be, Was this power executed? The answer, as he may anticipate, will be, It was not. The object of the inquiry is to cast upon the seller and his solicitor the responsibility of stating, and therefore of ascertaining the fact, and for which statement they would be responsible. Such an inquiry has often, moreover, led to the production of a deed which it had been intended to suppress, and it leaves to the seller or his solicitor no excuse for his fraud or negligence, if an appointment really was made, and created an incumbrance still in existence.

13. He should direct generally the usual searches to be made; for example, for judgments, crown debts, annuities, and, if deemed necessary, the insolvent court should be searched, and of course the register office, where the estate lies in a register county; but the extent of search must be very much guided by the station and character of the vendor, although we shall hereafter have occasion *to consider this matter more in detail: the purchaser should never rely solely upon having the deeds delivered up to him; they would not protect him against judgments or the like, and often not against mortgages, or against an annuitant who might not be postponed, simply on the ground of leaving the title-deeds in the hands of the grantor, for, generally speaking, the title-deeds are not delivered to an annuitant (s).

14. He should likewise direct the court rolls to be searched, in order to ascertain that no documents have been omitted: indeed it has been said, as we shall see, that the court rolls are notice to a purchaser (t).

15. Where a particular piece of evidence is known to exist, of course the seller is bound to produce it, — for example, a certificate of a marriage, — and the purchaser's solicitor is never directed to search for it; but where it is not known whether there are not suppressed incumbrances, such searches are directed for the pur-

(s) But see *Bernard v. Drought*, 1 Molloy, 38. (t) Vide ch. 23, *post*.

chaser's own satisfaction, and he bears the expense of them, unless the contract goes off by the seller's default or want of title, and then he may recover the expense. A purchaser, if he please, may ask the seller whether there is any incumbrance, — judgment, crown debt, annuity, or the like, — and may rest upon the statement, if he chooses to depend upon the seller's veracity or solvency. The question, however, should always be asked of the seller *before* the purchaser's solicitor makes any search, for if the answer be in the negative, which the subsequent search proves to be untrue, the seller, it is apprehended, would be bound to pay the expense of the search, for the search would then be proved to have been necessary not simply for the purchaser's satisfaction, but for making out the real state of the vendor's title: this, however, is never insisted upon in practice.

16. If a deed was executed by attorney, he should require the production of the power of attorney, and evidence that the principal was alive when the deed was executed by the attorney (*u*).

17. It is the duty of the conveyancer, in perusing an abstract, although the labor generally falls upon him upon a re-perusal, to consider the evidence necessary to support the title. In general, no difficulty arises. The sort of evidence required to support a title is known to all, and consists mostly of office and attested copies, or extracts, where the originals cannot be obtained; and where it is necessary to prove the root of the title, or any intervening portion of it, without the common evidence of conveyances, mortgages, or *wills, leases, land-tax assessments and poor's rates are resorted to, in addition to affidavits of old inhabitants.

18. Pedigrees are generally readily proved, where the possession has gone according to them; the difficulty arises where a person claims as heir under a long pedigree, which has no other connexion with the title (*I*). Long practice makes men particularly cautious in accepting such a title, for it is often as difficult to point out a defect in it where there is no contest, as it is to defend it where there is; for a question of identity, legitimacy, seniority, or a failure of issue, may at once destroy a pedigree when the real claimant appears, although on the face of the pedigree all appeared to be correct: and in some cases portions of the real pedigree have been fraudulently omitted,

(*u*) Vide ch. 13, s. 1, *post*.

(*I*) How far a pedigree is itself evidence, see Davies & Lowndes, 7 Scott, N. R. 140.

and in others the registries themselves have been fraudulently altered. Counsel, therefore, cannot be too much upon their guard; and yet, unless some reasonable doubt can be thrown on the pedigree, the purchaser may be compelled to take the title, and the very circumstance of resisting the seller's right may lead to a claimant. In tracing a pedigree, the late act altering the law of descent should be kept in view, as it in many cases alters the descent (*x*).

19. Recitals in deeds of a pedigree are entitled to great weight where the possession is enjoyed according to the pedigree; but in a case (*y*) where, after estates for life, an estate tail was created by a will dated in 1732, and the first tenant for life died in 1747, and trustees in the will under a power entered into possession to raise a legacy, and in 1750 created a term of years by way of mortgage to secure what remained due, and until 1793 no person entitled under the will enjoyed the estate or made any claim to it; but in that year certain persons residing abroad claimed as issue in tail, and executed deeds in which their title under the will, in default of issue of a previous devisee, was recited, and by which deeds, and a fine and recovery, they conveyed to a purchaser in fee, and the purchaser afterwards obtained an assignment of the mortgage term from the personal representative of the mortgagee, and the possession, from 1793 to 1826, a period of 33 years, had remained undisturbed; upon a bill filed for a specific performance against a subsequent purchaser, the Master thought the title bad, and the Court confirmed his opinion; for the recitals, whatever effect they might have against the parties to the deeds, could not, as against third *parties be any evidence of the pedigree. If evidence had been given that possession had followed and accompanied the pedigree, if between 1747 and 1793 a possession had been shown passing from father to child under the entail created in 1792, that enjoyment would have been a strong circumstance to prove that the persons named in the pedigree did, in fact, fill the characters which it was in 1793 alleged that they did fill. With nothing but the recitals of the deeds executed in 1793, the conveyance to the purchaser, and the subsequent enjoyment under that conveyance, with no proof of the pedigree on which the title depended, or of possession from 1747 to 1793, according to that pedigree, the Court could not say that this was a title which a purchaser would be compelled to accept.

(*x*) *Post*, ch. 11, sect. 2. The new act Will. 4, c. 85.
for registering births is 6 & 7 Will. 4,

(*y*) *Fort v. Clarke*, 1 Russ. 601; see c. 86, and the new marriage act, 6 & 7 *post*, sect. 1.

20. Of course every link in the chain of the pedigree should be proved, as the marriage of the parents and the baptism of the son, and the certificate of the burial of the father, or the probate of his will, or letters of administration to him, in order to prove the son's right to an estate by descent from his father; and, where she was dowable, proof of the mother's burial and the discharge of her arrears of dower, if recently dead, should be required, and inquiry should be made after any settlement executed by either father or son. The proof of failure of issue of an elder branch, as of a first son, is often slight and depending upon affidavits; but weight may be given to such evidence where the possession of the estate has gone with the pedigree produced.

21. The new registers will in most cases supply what the old registries did not, the time of birth of the parties; but considering how wide a door this opens to fraud, it will not hereafter be safe to place too much reliance upon them.

22. Presumptions of marriages, and therefore of legitimacy, and of deaths without issue, may often be made in a court of law between contending parties, where a purchaser would not be compelled to take such a title (*z*), and yet the Court has directed the seller's pedigree to be tried in an issue between him and the purchaser.

23. A seller cannot himself prove a fact upon which the title depends (*a*).

24. The certificate of a stockbroker, that a fund stands in the books of the Bank, is not sufficient evidence of that fact as against a purchaser (*b*).

25. It would be useless to give any forms of abstracts, because every one having occasion to draw one can obtain precedents, and *common attention to the rules will readily enable the practitioner to correct the faults of the precedent before him. But he will best draw an abstract, and he best peruse it when drawn, who most understands the operation of the instruments themselves.

(*z*) See *post*, ch. 10.

(*a*) *Hobson v. Bell*, 2 Beav. 17.

(*b*) S. C.

SECTION III.

OF COMPARING THE ABSTRACT WITH THE DOCUMENTS.

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| 1. <i>Abstract, when complete.</i> | <i>offices.</i> |
| 2. <i>No inquiry in suit whether perfect.</i> | 16. <i>Grant from the Crown: impropriate tithes: tithe rentcharges.</i> |
| 3. <i>Acceptance of abstract.</i> | 17. <i>Notice to purchaser of place of production.</i> |
| 4, 14. <i>Restricted abstract by contract.</i> | 18. <i>Seller having covenant to produce deeds must produce them.</i> |
| 5. <i>Of the title of a tenant in common.</i> | 19. <i>Promise to produce deeds.</i> |
| 6. <i>For what purposes abstract delivered.</i> | 20. <i>Deeds burned after examination.</i> |
| 7. <i>Purchaser's property in it.</i> | 22. <i>Copies of court roll.</i> |
| 8. <i>Seller to produce the deeds.</i> | 23. <i>Abstract to be examined before purchaser act as owner.</i> |
| 9. <i>Place for examination.</i> | 24. <i>Expense of examination where no title.</i> |
| 10. <i>At a third person's.</i> | 25. <i>Purchaser neglecting to call for deeds for examination.</i> |
| 11. <i>At a distance, seller to pay expense.</i> | |
| 12. <i>So in sale by court.</i> | |
| 13. <i>Agent in London to examine abstract.</i> | |
| 14. <i>Southby v. Hutt: verifying abstract.</i> | |
| 15. <i>Purchaser not bound to go to record</i> | |

WE have still to consider when the abstract is considered to be complete, and where the deeds should be produced in order to be examined with the abstract (*a*). And whilst we are upon the latter subject, we may consider not only the general question of a purchaser's right to the title-deeds, and the rules of the courts in enforcing their production, but also the purchaser's right to attested copies, and a covenant to produce the originals, and whether the latter covenant will run with the land.

1. The abstract ought to mention every incumbrance whatever affecting the estate, and should, therefore, contain an account of every judgment by which it is affected (*b*); but equity considers it complete whenever it appears, that upon certain acts done, the legal and equitable estates will be in the purchaser; which may be long before the title can be completed (*c*). And even at law, *where a tenant was described in the contract as in possession under a lease, which operated merely by estoppel, as the mortgagee did not concur in it, the title was deemed good, as the seller was ready to procure a re-conveyance from the mortgagee, so

(a) See section 1, *supra*.

(b) *Richards v. Barton*, 1 Esp. Ca. 268.

(c) See 8 Ves. jun. 436; and 1 Jac. &

Walk. 421; see *Mosley v. Cook*, 2 Harc. 106; *Jumpson v. Pitches*, 1 Coll. 13.

that the lease might operate in interest (*d*). Although the estate is sold free from incumbrances, and the abstract shows an amount of incumbrance exceeding the purchase-money, yet it must be considered that the seller can make a good title (*e*); nor can any objection be made on the ground of an incumbrance where the incumbrancer may be brought in and be compelled to join in the conveyance (*f*), nor to the want of registry of any deed, for where there is no other subsequent purchaser who has registered his conveyance, the objection is capable of being removed at any time before the completion of the purchase (*g*), but of course the objection must be removed in due time. This rule is properly confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join, the abstract cannot be deemed perfect until it shows that he has given perfection to the title (*h*). If the estate be vested in a person, not for the purpose of securing a right, but for the purpose of enabling that person to perform a duty to others, then until that duty has been performed there can be no right to call for a conveyance (*i*).

2. But the ordinary rule of the Court does not authorize an inquiry before the Master, whether the abstract was perfect, and if deficient, in what respects its deficiencies consisted, and whether it was ever perfected (*k*). We have already seen what the usual reference is as to title (*l*).

3. If, as we have already seen, the purchaser accepts an abstract as showing a satisfactory title, yet he is not precluded from showing by other evidence that the title is a bad one (*m*).

4. We have before seen how unwillingly the courts hold a limited obligation to produce deeds to amount to a condition to accept the title, though unmarketable (*n*).

5. And even if two persons be tenants in common and hold under the same title, as in the case of partners buying real property *or holding such property bought by one of them, a contract to sell by the representatives of the one to the survivor, with a stipulation that the sellers should deliver to the purchaser at their own

(*d*) Webb v. Austin, 8 Mees. & Wels. 419.

(*e*) Townsend v. Champernown, 1 You. & Jerv. 449.

(*f*) 2 Moll. 583.

(*g*) Ch. 10. *post*.

(*h*) Lewin v. Guest, 1 Russ. 325; see 2 Molloy, 583.

(*i*) Sidebottom v. Barrington, 3 Beav. 525.

(*k*) Bennett v. Rees, 1 Kee. 405.

(*l*) *Supra*, ch. 4, s. 4; ch. 8, s. 2.

(*m*) Shepherd v. Keatley, 4 Tyr. 571; *supra*, p. 403.

(*n*) Ch. 8, s. 1. *supra*.

expense "an abstract of their title," means an abstract of the *general* title, and it is not to be confined to the acts of the deceased partner, and the title under him, although the purchaser was bound by the contract to purchase subject to all imperfections of title before the commencement of the title of the deceased partner (*o*); so that a man may be entitled to an abstract of the title, and yet be compelled to accept the title itself as it stands.

6. The abstract is delivered for the following purposes: First, That the purchaser may see whether the title is such as he will accept. He has also a right to it after he has taken an opinion, in order to take another opinion in case he is not satisfied with that, and for the purpose of taking further objections, and of further considering the title. He must have it too for another purpose, to assist him in preparing his conveyance, that he may see who must be made parties, what form of conveyance is expedient, what parcels are to be inserted, and the like (*p*). As to the general property in the abstract, it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the meantime the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled, for his own justification, in order to show on what ground he did reject the title (*q*). If the purchase go off, not only is the abstract to be returned, but no copy to be kept, lest it should be used for a mischievous purpose (*r*); and although the purchaser pays for the opinion, yet, for the same reason, that ought, it should seem, to be returned with the abstract (*s*).

7. In a case where the purchaser returned the abstract to the seller to answer the queries and opinion of counsel, it was held that the purchaser might maintain trover against the seller for the abstract, although the seller himself might ultimately be entitled to the abstract. The temporary property of the purchaser in the abstract was sufficient to enable him to maintain the action (*t*).

8. The seller is bound to produce the deeds, in order that the abstract may be examined with them, although they are not in his

(*o*) *Morris v. Kearsley*, 2 You. & Coll. 139.

(*p*) See 2 Taunt. 276, *per* Mansfield, C. J.

(*q*) 2 Taunt. 278, *per* Chambre, J.

(*r*) 2 Taunt. 277, *per* Lawrence, J.

(*s*) See and consider 2 Taunt. 270, *per* Mansfield, C. J.; *Alexander v. Crosbie*, 2 Ir. Eq. Rep. 143.

(*t*) *Roberts v. Wyatt*, 2 Taunt. 268.

*possession, and the purchaser will not be entitled to the custody of them (*u*).

9. A question often arises as to the place at which the deeds should be produced. A production at the seller's country seat where the estates lie, or at his known residence elsewhere at the time of the contract, could not, it should seem, in general be objected to, and if the deeds are in London, that would be the proper place to produce them: this could hardly be deemed a surprise upon a purchaser, because it is generally known that many title-deeds are, at least preparatory to a sale, lodged in the hands of town solicitors. But it is seldom that any difficulty arises in this respect, for the contract mostly points out from the context where the deeds should be produced; and where they are in the seller's own possession, it is seldom that a satisfactory arrangement cannot be made for their production.

10. But provided the purchaser's expense is not increased, the seller may perform his obligation by procuring the purchaser an inspection of them at the residence of any third person; for example, of the person entitled to hold them in respect of other estates, or of an incumbrance. To the purchaser it is indifferent whether he examines them at the abode of one person or of another; and where some of the deeds are in the seller's possession, and some in a third person's, a purchaser would not be allowed to object to attend at several places if they were within a reasonable distance. But if the deeds, or any of them, are in the custody of other persons living at a distance from the place where they ought to be produced, the purchaser must send there to have them examined, but the seller must pay the expense of the journey,—that is, the additional expense,—for let the deeds be where they may, the purchaser would have to examine them at his own expense.

11. This was so ruled in a case before the Master (*x*), upon a sale by assignees of a bankrupt. A settlement of 1763 was in the possession of a former purchaser, and there was only a covenant to produce a copy of it. A bill was filed by the assignees for a specific performance. The purchaser was informed that the settlement was in the possession of a gentleman in the country, and *might be seen there*. He was ready to covenant to produce it. The purchaser submitted to the Master, that it was the duty of the sellers to produce the deeds stated in the abstract before the Master, or to the purchaser's solicitor in London. The Master

(*u*) *Post*, pl. 18.

(*c*) *Sharp v. Page*, Rolls, 1815, MS.

stated, that he would make inquiry of conveyancers, what the *practice in such cases was, and afterwards decided, that the purchaser's solicitor ought to send to Baldock, where the deeds were, to compare the abstract with the settlement, but that the sellers ought to pay the expenses of such journey.

12. In a late case upon a sale by the Court itself, the Vice-Chancellor expressly held, that the vendor must be at the expense of the purchaser's solicitor going from place to place to compare the abstract with the deeds, and that the purchaser was not bound to send the abstract to an agent in a country town in order that he might compare the abstract with the deeds (*y*).

13. But the rule is, that the agent in London of the country attorney of the purchaser should examine the abstract with the deeds where they are in London, and therefore the client, the purchaser, cannot be charged for the country attorney's journey, &c. to London to make the examination, not even if he undertook it at the request of the client, unless he distinctly informed the client that it was not by the usage of the Profession considered to be necessary that such expense should be incurred (*z*).

14. Where the seller stipulated by the conditions of sale to deliver an abstract of title and deduce a good title, but in a subsequent condition provided that he would deliver to the purchaser all the title-deeds and copies of deeds and other documents in his custody, "but should not be bound to produce any original deed or other documents than those in his possession, and set forth in the abstract, or which related to other property," it was held that he was bound to verify the abstract; the clear condition as to the abstract and good title was not allowed to be overreached by the ambiguous provision in the condition as to the delivery of the deeds (*a*).

15. If a seller cannot produce the originals, as in the case of wills and records, he cannot require the purchaser to send round to the different offices to examine the abstract with the originals, or with the records, even where that will be permitted by the rules of the office, although he (the vendor) is willing to pay the expense of the attendances, but he must procure office copies or extracts, as the case may require, in order to enable the purchaser's

(*y*) *Hughes v. Wynne*, 8 Sim. 85.

(*a*) *Southby v. Hutt*, 2 Myl. & Cra.

(*z*) *Alsop v. Lord Oxford*, 1 Myl. & 207; see 8 Scott, 551.

Kee, 564.

solicitor to examine the abstract with them, and to lay them before his counsel if it should be deemed necessary.

16. Where a grant from the Crown is the foundation of the *title, although the seller claims the fee free from charges, a purchaser is anxious to have an office copy of the grant, in order to ascertain whether any rents were reserved by it, and whether it was upon any condition or the like ; but if the seller's solicitor searches for it, and informs the purchaser where the grant is to be found, the latter must be content to have it examined by his own solicitor at the office where it is kept. This generally arises upon titles to inappropriate tithes. And now, although inappropriate tithes may be merged (*b*), or a rentcharge substituted for them (*c*), yet the practice will remain unaltered, because no greater interest would merge than the party had, and the rentcharges are subject to all the incumbrances to which the tithes themselves were liable (*d*).

17. Where in a contract providing in the usual way for the delivery of an abstract, and making a good title, and the execution of a conveyance on payment of the purchase-money, it was provided that if the seller should not deliver an abstract of his title to the purchaser or his agent before a day named, and should not verify the same by the production of all the deeds, evidences, and writings in support thereof to the purchaser at Norwich, at Lynn, or in London, before a further day named, &c., then the agreement should be void, it was held to be incumbent on the seller to give notice to the purchaser at which of the places he would be ready to produce such title (*e*).

18. If the seller have only a covenant to produce the deeds, yet he must procure the production of them. If the purchaser went to inspect the deeds, the holder might refuse to produce them to him, and would not be liable to an action of covenant for non-production. The law supposes that every vendor has the deeds in his own hands, and in his power to produce (*f*). This has always been the practice.

19. If the seller's attorney state that, if required, the deeds, although in the hands of a third party, will be applied for, the purchaser, although he prepare and engross his conveyance, which is

(*b*) 6 & 7 Will. 4, c. 71, s. 71; 1 & 2 Vict. c. 64.

(*c*) 6 & 7 Will. 4, c. 71.

(*d*) *Ib.* sect. 71.

(*e*) *Rippingall v. Lloyd*, 2 Nev. & Mann. 410.

(*f*) *S. C.*

executed, will not be bound to complete his purchase unless the deeds be produced (*g*).

20. Where a purchaser's solicitor examined the deeds for the purpose of comparing them with the abstract, and the deeds were afterwards accidentally burnt before the title was accepted, it was *insisted that the solicitor had the opportunity to learn who were the attesting witnesses, and that the purchaser must sustain the inconvenience of his negligence in this respect; but the Court observed, that the purpose of the examination of the deeds by the purchaser's solicitor, was merely to ascertain whether the contents of the deeds corresponded with the statement in the abstract, and not to learn how the deeds were to be proved by secondary evidence, in case they should be destroyed, which event could not at that time be in contemplation of any party, and therefore it could not be imputed to him as culpable negligence that he did not inform himself of the attesting witnesses (*h*).

22. In the case of a copyhold estate, the copies of court-roll are the documents of title, or, in common parlance, the "title-deeds." The purchaser is entitled to have them furnished to him just like other documents of title (*i*): if the seller is entitled by stipulation or in respect of other estates to retain them, the purchaser is still entitled to their production, in order that the abstract may be examined with them.

23. The purchaser should not deal with the estate in any manner as owner until the abstract has been examined with the deeds. For although the abstract be negligently prepared, yet in the absence of fraud the seller will not be answerable, as the purchaser himself, by exercising ordinary care, may avert any loss from the seller's negligence. Therefore if an abstract show a good title, and the purchaser resell at a profit, and upon an examination of the deeds it turn out that the title is bad, and he has to pay the second purchaser his costs of investigating the title, yet he cannot recover them over, nor could he recover the costs of the resale or any damages (*k*).

24. And as the comparison of deeds with the abstract should be made early, the purchaser will be entitled to the expense of the examination and of journeys for that purpose, if ultimately the seller cannot make a title; and it cannot be objected that the pur-

(*g*) *Jarmain v. Eglestone*, 5 Carr. & Pay. 172.

(*h*) *Bryant v. Busk*, 1 Russ. 1.

(*i*) See the evidence of the practice by

different solicitors in *Whitbread v. Jordan*, 1 You. & Coll. 317.

(*k*) *Walker v. Moor*, 10 Barn. & Cress. 416.

chaser ought to have waited till he knew whether a title could be made (*l*).

52. In a case before Lord Thurlow (*m*), an exception was taken to the title to some copyhold lands, for that no surrenders had been produced before the Master. To this it was answered, that an **abstract* of the several surrenders had been produced, and not objected to by the purchaser; that it was the constant practice in the Master's office to produce the abstract only, (which in general is previously compared, by the vendor's [vendee's] attorney, with the title-deeds,) and that if the vendee does not insist upon the production of the title-deeds, the Master makes his determination on the abstract only, which had been done in the present case. And to this the Lord Chancellor agreed, and said, that as the vendee might call for the title-deeds before the Master if he thought proper, he should take it for granted, whenever the vendee omitted so doing, that he was satisfied the abstract was correct. And therefore, though this objection was true in letter, it was false in spirit, for in reality the production of the abstract unimpeached was the production of the surrender, and therefore he overruled the exception to the Master's report.

26. This case furnishes a general rule, nor will the Court when a bill is filed allow a purchaser who had not called for the deeds to raise an objection for want of their production, so as to throw the costs of the suit on the seller (*n*). And we have already seen, that although the time fixed for delivery of the abstract is imperative at law, yet in equity, with reference to time, it is nearly as incumbent upon the purchaser to call for the abstract, as it is for the seller to deliver it (*o*).

(*l*) *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 499.

(*m*) *Poole v. Shergold*, 1 Cox, 160.

(*n*) Ch. 16, *post*.

(*o*) Ch. 5, *supra*.

*SECTION IV.

OF A PURCHASER'S RIGHT TO THE DEEDS (1).

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| <ol style="list-style-type: none"> 1. <i>Warranties.</i> 4. <i>Pledge by seller of escrow.</i> 5. <i>Right of purchaser to follow the deeds.</i> 7. <i>Lien of Seller's solicitor.</i> 8. <i>Deeds left with third person to prepare conveyance.</i> 10. <i>Or with the purchaser.</i> 12. <i>Sale of part without stipulation.</i> 13. <i>Where seller is under covenant to produce.</i> 14. <i>Leaving deeds in seller's custody.</i> 15. <i>Arrangement where estate in mortgage.</i> 16. <i>Opinion of R. P. Commissioners.</i> 17. <i>Deposit of deed, where sufficient.</i> 19. <i>Implied notice of pledge of documents.</i> 20. <i>Nature of evidence.</i> 22. <i>Assignments lost.</i> 23. <i>Lease for a year lost.</i> 24, 28. <i>Recitals as evidence.</i> 25. <i>Evidence where deeds lost or destroyed.</i> | <ol style="list-style-type: none"> 26. <i>Title without deeds.</i> 27. <i>Seller to execute new conveyance if old one burnt.</i> 28. <i>Prosser v. Watts : recitals.</i> 29. <i>Whether covenant to produce within covenant for further assurance.</i> 30. <i>Purchaser's right to evidence after conveyance.</i> 32. <i>Relieved if fraud, &c.</i> 33. <i>Execution of title-deeds not to be proved.</i> 34. <i>Laythoarp v. Bryant.</i> 35. <i>Effect of it.</i> 37. <i>Will to be produced though seller heir.</i> 38. <i>Not to be proved against heir.</i> 42. <i>Whether the deeds are transferred with the seisin.</i> 43. <i>Grant of deeds.</i> 44. <i>Yea v. Field.</i> 45. <i>Observations upon it.</i> |
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1. IN regard to the general right of a purchaser to the title-deeds, we may observe, that whilst warranties prevailed, and before

(1) In the United States, where deeds of conveyance of lands are universally registered, the grantor retains his own muniments of title; the grantee being ordinarily permitted to give in evidence certified copies, from the registry, of all deeds under which he claims or deduces title, to which he was not himself a party, and of which he is not therefore supposed to have the control; the burthen of proof being on the other party, to show some circumstances impeaching the deed, and so taking it out of the rule, and requiring its production. 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, ch. 9, §19 note (1); 4 vol. p. 164; 1 ib. 75, note (1); 1 Greenl. Ev. §571, note (5); Scanlan v. Wright, 13 Pick. 523; Woodman v. Coolbroth, 7 Greenl. 181; Loomis v. Bedel, 11 N. Hamp. 74; Knox v. Silloway, 1 Fairf. 201; Kelsey v. Hammer, 18 Conn. 311; Ford v. Peering, 1 Vesey, jr. (Sumner's ed.) 72 note (a). And where a copy is, on this ground, admissible, it has been held that the original, which has been duly registered, might be read in evidence, without proof of its formal execution. Knox v. Silloway, 1 Fairf. 201. This practice however, has been restricted to instruments which are by law required to be registered, and to transmissions of title *inter vivos*; for if the party claims by descent from a grantee, it

covenants were introduced, the title-deeds, except where they were necessary for the defence of the feoffor, who had himself entered into a warranty, went with the estate (a); and this right moulded itself according to the interests of the parties; if a man enfeoffed two, and the heirs of one of them by deed, and the deed and other evidences concerning the land were delivered by the feoffor to him who had the fee, and afterwards he who had the fee died, he who survived should have the deed by which he was enfeoffed, because it makes his estate; but he should not have the ancient charters, for they were delivered to the other joint tenant for the safeguard of his inheritance, which Coke calls a notable case (b). Again, if a man enfeoffed two, to them and their heirs, and gave the ancient *charters to one of them, and he died, the survivor should have all the charters, and not his heir, to whom the gift was made, for he could sustain no loss from the want of them, nor receive any benefit by them if he had them, but *contra* of the survivor; but he should have them as things which went with the land (c).

2. But even under that rule, such things as were not necessary to the defence of the seller, as exemplification of records, court rolls, pedigrees, or the like, belonged to the grantee of the land, without any grant of the deeds (d), because they were not material evidence to defend the title paramount.

3. The practice as to the custody of title-deeds has varied greatly since the time of Elizabeth, but the principles of law regarding them are still the same. The title-deeds are things which go with the inheritance, descend with it, and pass with it by conveyance without being named (e).

4. The rule that the person who is entitled to the land has a right to all the title-deeds affecting it, is carried out to all its consequences. Therefore, where a seller, upon receipt of part of the purchase-money for a leasehold estate, executed an assignment as an escrow, which, with the deeds, was left with the solicitor for both parties, to be delivered to the purchaser when the rest of the money was paid, it was held that the vendor could not by the aid

(a) Lord Buckhurst's case, 1 Rep. 1.

(b) 1 Rep. 2 a.

(c) 1 Rep. 2 b.

(d) Moo. 503; see 3 Ves. jun. 226.

(e) See *Austin v. Croome*, 1 Carr. & Mars. 653.

has been held that he must produce the deed to his ancestor, in the same manner as the ancestor himself would be obliged to do. *Kelsey v. Hammer*, 18 Conn. 311. A want of the regular registration of the deeds, by which a vendor deduces title, there being no other proof of their execution, is an insuperable objection to compelling the vendee to receive a conveyance. *Bartlett v. Blanton*, 4 J. J. Marsh. 428.

of the solicitor pledge the deeds to a third party, although an innocent one, for more than the balance due, because the deeds belonged to the purchaser, and neither the seller nor the solicitor had any right over them, but held them until the purchaser had paid the balance due. The person with whom the deeds were pledged obtained them from a person who had obtained them by fraud, and although he received them on a valuable consideration, and there was nothing on the face of them which showed that there was a title in the purchaser—for the assignment to him was withheld—he could not retain them against the purchaser (*f*).

5. And although the purchaser leave the deeds without fraud, but negligently, in the hands of the seller, yet *any* subsequent purchaser from the first purchaser may, upon his legal title, recover them in trover, even against a person to whom the original seller has fraudulently conveyed the estate, as if he were still owner of it, and delivered the deeds up to him: his negligence was held not to affect his legal right to the deeds, although his negligence had enabled another to commit a fraud; and besides, there was equal *negligence on the part of the holder of the deeds, who had not inquired in whose possession the estate itself was (*g*).

6. In *Hooper v. Ramsbottom* the deeds had been deposited for the purchaser, who had not *completed* his purchase: in *Barrington v. Price* the purchase was completed, and the owner of the land stood upon his mere right to the deeds as incident to his ownership.

7. In a case, however, before Hart, L. C., in Ireland, an annuitant allowed the title-deeds to remain in the possession of the seller, who was tenant for life, and he delivered them to his solicitors, who claimed a lien on them for costs, and the Court refused to relieve against them; for it was said, if a purchaser will permit the vendor to retain the deeds, and he pledges them, although this be a fraud in the vendor, the Court could not take them away at the instance of one who was instrumental, by his negligence, in leaving them in the vendor's hands, from parties not contaminated with such fraud (*h*).

8. But the principle has been carried so far, that where a man delivered the title deeds of his wife's estate to a person to draw a

(*f*) *Hooper v. Ramsbottom*, 4 Camp. Ca. 121; 6 Taunt. 12.

(*g*) *Harrington v. Price*, 3 Barn. & Adol. 170.

(*h*) *Bernard v. Drought*, 1 Moll. 38;

but see *Smith v. Chichester*, 2 Dru. & War. 393; and see *Blunden v. Desart*, ib. 405; as to a solicitor's lien on title-deeds for the costs of the suit, see *Baker v. Henderson*, 4 Sim. 27.

conveyance, which was accordingly drawn, and by which, with a fine, the estate was settled on the wife and one of the sons, it was held that he could not maintain trover for the deeds against the conveyancer, because the muniments of an estate belong to the person who has the legal interest in it, and the plaintiff had no longer a right to them, as the property itself was no longer vested in him (*i*).

9. It will be observed that the conveyance was actually completed, and the new title in operation. It must not be understood that the seller's attorney, as soon as the conveyance is executed, can refuse to deliver back his title-deeds to him: the seller may, if he please, recover the deeds and complete the purchase with the purchaser, without the intervention of his attorney.

10. So if upon an agreement for a purchase, the seller deliver the instrument under which he holds the estate to the purchaser, in order to enable him to prepare a conveyance to himself, the latter will, upon payment of the purchase-money and taking a conveyance, be entitled to retain possession of the instrument; but if the purchaser refuse to perform the contract according to its import, or *to return the instrument, an action of trover will be maintainable for it (*j*).

11. In Ireland, by a general order, an opinion ought to be obtained that a good title can be made before an estate is sold before the Master, and it was held that an opinion so taken was the property of the plaintiff, as part of the proceedings in the cause, and consequently that the purchaser was not entitled to have it delivered over with the title-deeds (*k*).

12. Upon a sale of part of an estate without any stipulation as to the deeds, the prevailing opinion has been that the holder of the portion of the highest value is entitled to the custody of the deeds,—whether the seller or the purchaser,—giving to the other a covenant to produce them; but of course the purchaser would not be bound to furnish the seller with attested copies of them.

13. It would not, it should seem, be a sufficient reason why a seller should retain the deeds, where he sells the property in respect of which he retained them, that he had covenanted with a former purchaser of part of the estate for the production of them: but the seller would be entitled to have the covenant recited in the conveyance or indorsed on it, and might fairly require a covenant from the

(*i*) *Philips v. Robinson*, 4 Taunt, 103. 451.

(*j*) *Parry v. Frame*, 2 Bos. & Pull. (*k*) *Foster v. Foster*, 1 Hogan, 224.

purchaser to perform it. The seller would not be at liberty, after the second sale, to deliver the deeds to the first purchaser.

14. There is great inconvenience in leaving the title-deeds in the hands of a seller who has parted with the whole of the property, although he has covenanted to produce them, for the obligation is soon forgotten or disregarded, and the deeds accordingly are in danger of being neglected or destroyed, unless by being sometimes called for, they produce emolument in the hands of a solicitor.

15. Where the estate is in mortgage at the time of the sale, and only part of it sold, and the mortgage is not wholly paid off, as the mortgagee cannot be compelled to covenant for the production of the deeds, and of course will not part with them, some careful provision on this head should be made before the sale. If the mortgagee should agree to covenant for the production of them, he would probably limit his responsibility to the time he should continue mortgagee, which would not be satisfactory to a purchaser or binding upon him; or if the mortgagee were to enter into a general covenant to produce the deeds, he would, upon being paid off, probably object to relinquish the possession of the deeds unless he were released by the purchaser from his covenant, which would lead to expense and vexation. An arrangement might be made in *such a case for the deposit of the deeds at a banker's, for example, for the benefit of the mortgagee and purchaser until the mortgage was paid off or foreclosed, and the deeds might then be delivered up to him or to the seller (as the case might require), upon his entering into a covenant to produce them to the purchaser, and this could be provided for by the conditions of sale or agreement; and it admits of no doubt that any stipulation of that nature would be binding upon the purchaser, and could not be disregarded by a court of equity.

16. The real property commissioners, in discussing the law in regard to covenants for the production of deeds, observe, that in the case of a mortgagee, he cannot be compelled to produce the deeds or allow their inspection till his debt is paid; the effect of which doctrine is, in many cases, to prevent the mortgagor from dealing with his equity of redemption; and, upon the whole, they see no sufficient reason for continuing this privilege to mortgagees. And they think every person showing a right in land consistent with the title of the party holding the deeds may compel the production of them (1). This proposal is somewhat startling. No

(1) 3d Report.

reason is stated why the right of the mortgagee should be broken in upon except the convenience of the mortgagor, whilst the production of the deeds for his convenience would frequently operate not simply to the inconvenience but to the positive damage of the mortgagee ; and, as the right is with him, and he may be paid off, there appears to be no ground for altering the law. In regard to the general right of persons claiming consistently with the title of another to have the deeds produced, that would lead to more mischief, probably, than the present rule, which can always be extended by provident purchasers. In many cases, *e. g.* sales of small pieces of land for the accommodation of parties, by the owner of a great estate, the purchaser would not venture to ask for the family title, or a covenant to produce the deeds, nor would the family produce them, but the conveyance is accepted upon the understanding, although nothing is expressed on the subject, that the purchaser is to be satisfied with a simple conveyance. Equity in such a case would not, it should seem, contrary to the real nature of the transaction, enforce the production of the deeds after the execution of a conveyance (*m*), and yet a general law would effect that object. In many other cases the rule would lead to injustice.

17. In a proper case a purchaser will be compelled to be content with the deposit of a deed for the benefit of himself and others interested in it. As where the reversion of an estate was sold in *lots, subject to a ground lease, which contained covenants to the benefit of which the purchasers would be entitled. Nothing was said in the particulars of sale as to the custody of the counterpart of the lease, and it was not in the possession of the sellers, but of one of the other parties to a partition. Lord Eldon said, he was of opinion that the counterpart of the lease not being in the possession of the plaintiffs, was not an objection to their title. No doubt the parties would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant if necessary. But unless the deed was deposited, he would not compel the purchaser to take under one of the lessors. It would be too much to put the purchaser to the necessity of filing a bill from time to time to have the counterpart delivered to him as often as he might want it. The lease was deposited, and Lord Eldon enforced the purchase (*n*).

18. And although in the above case there was an equitable right to compel the production of the deed, and the deed itself was en-

(*m*) Vide *infra*, s. 5, pl. 3 ; s. 6, pl. 22.

(*n*) *Shore v. Collett*, Coop. 234.

rolled in the Common Pleas, yet that was not deemed satisfactory by the Court.

19. It is of great importance not on light grounds to be satisfied without the production of the muniments of title, whether the estate be freehold or copyhold, for if the documents are pledged, he may, by want of inquiry, be held in equity to be bound by the deposit (*o*).

20. There are few titles in which all the evidences of title are within the purchaser's reach, so as to enable him to furnish them to a future purchaser, and yet he may be bound to accept the title: in many cases a purchaser is entitled to have instruments produced as *negative* evidence that the estate sold was not comprised in them, yet he would not be entitled to a copy of them, or a covenant to produce them, although a purchaser from him may be as anxious to ascertain the fact as he was. So portions become settled, and mortgaged, and assigned, and are ultimately released, and the purchaser at the time satisfies himself of the contents of the deeds of settlement, &c., but rarely can procure a covenant to produce them all; yet a subsequent purchaser, where some time has elapsed, is seldom advised to consider the want of these deeds as an objection to the title, nor could the objection in many cases be insisted upon.

21. So there are few cases in which a purchaser is not compelled to take a title depending in many respects upon evidence which, *although it may be satisfactory as a proof of the fact, yet could not be received in a court of justice; for example, upon a question of identity, affidavits of old inhabitants are furnished, and if satisfactory, the purchaser is bound to accept the title, yet the affidavits could not be used in support of the title; they however prove the fact, and show that evidence from living persons can at that time be obtained to establish it (*p*).

22. It seems formerly to have been thought, that a plaintiff in an ejectment for a leasehold estate could not recover, unless the original lease and all the mesne assignments were proved; but this rule has been relaxed, and where the possession has been uniform, the jury will be recommended to presume any old assignments which have been lost (*q*). It cannot, however, be laid down as a general rule, that a purchaser of a leasehold estate can safely

(*o*) *Whitbread v. Jordan*, 1 You. & 388.
Coll. 303; and *post*, ch. 23.

(*p*) See *Scott v. Nixon*, 3 Dru. & War.

(*q*) *Earl v. Baxter*, 2 Blackst. 1228;
see 11 Ves. jun. 350; see *supra*.

accept the title where any of the mesne assignments have been lost, although he might be able to recover in ejectment if he actually did purchase. Every case of this nature must depend upon its own circumstances (*r*). A purchaser is at all events entitled to a strict inquiry as to the loss, and is not bound to rely upon an affidavit by the other party (*s*).

23. The loss of a lease for a year (I), where it was recited in the release, which was a conveyance to a tenant to the precipe, was held, in a suit against a purchaser, to be supplied by the 14 Geo. 2 (*t*): and the Court was of opinion, that it would not be unreasonable to presume, as the lease was recited in the release, and the parties were thus apprised of the necessity of the lease, that there was a lease (*u*). The deeds were 70 years old, and it is clear that a lease ought to have been presumed.

24. Where an old deed recites prior deeds, and the seller is unable to procure the instruments recited, the true inquiry is, whether the absence of the deeds recited throws any reasonable doubt upon the title. Where there is a title of sufficient age without the aid of the recited deeds, and no circumstance to repel the presumptions in favor of the title, the Court will compel the purchaser to accept it (*x*).

*25. The loss of the deeds may not be fatal to the title if the vendor can deliver over copies which would be evidence at law (*y*). But if the title-deeds are lost, the seller must furnish the purchaser with the means of showing what were the contents of the deeds, and of proving that they were duly executed, and this even where the deeds are accidentally destroyed by fire after the contract is made (*z*) (1).

26. A title *may* be a good one, although there are no deeds. In a late case the Master of the Rolls observed, that he was perfectly

(*r*) Vide *post*, *Hillay v. Waller*.

(*s*) *Stubbs v. Sargon*, 4 Beav. 90.

(*t*) C. 20, s. 5; see *post*, ch. 21, s. 7.

(*u*) *Holmes v. Ailsbie*, 1 Madd. 551; see *Skipwith v. Shirley*, 11 Ves. jun. 64; *Ward v. Garnons*, 17 Ves. jun. 134.

(*v*) *Prosser v. Watts*, 6 Madd. 59; see *Doe v. Brooks*, 3 Adol. & Ell. 513; *Gillett v. Abbott*, 7 Adol. & Ell. 783; as to recitals binding the parties to the

instrument in which they are contained, see *Bringlee v. Goodson*, 5 Bing. N. C. 738.

(*y*) *Harvey v. Phillips*, 2 Atk. 541; Mr. Booth's opinion, 2 Ca. & Opin. 223; see *Coussmaker v. Sewell*, App. No. 11, ch. 10, *infra*; *Const v. Barr*, 2 Mer. 57; *Brindley v. Woodhouse*, 1 Car. & Kir. 646.

(*z*) *Bryant v. Busk*, 1 Russ. 1.

(I) A lease for a year is no longer necessary; 7 & 8 Vict. c. 76, s. 2; 8 & 9 Vict. c. 106, s. 2.

(1) See *ante*, 453, in note.

satisfied that there were good titles in which the origin could not be shown by any deed or will, but then you must show something that is satisfactory to the mind of the Court; that there has been such a long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee-simple (*a*). And of course the absence of any documents in support of the title must be satisfactorily accounted for, so as to guard against the danger of settlements, mortgages, or wills having been suppressed.

27. And here we may observe, that if a conveyance to a purchaser have accidentally been burned, the seller will be compelled upon a resale to join in a conveyance to the new purchaser (*b*), or of course, if the estate is not resold, to again convey to the first purchaser.

28. In *Prosser v. Watts* (*c*), the Court observed, that there was no dispute that the recital of a deed is constructive notice of its contents; but to say that a purchaser is not to complete his contract unless he has the actual possession of every deed of which he has constructive notice by recital, would lead to a practical inconvenience which would be manifestly absurd. *Prima facie*, it is to be presumed that the purchaser in the ancient conveyance had actual inspection of every deed recited, and was satisfied with their contents, and it was not probable that a vendor would recite deeds which afforded evidence against his title. When there was no circumstance to repel the effect of these general presumptions, and when the title under the conveyance which contains the recital is fortified by sixty years undisputed possession, the Court thought it a good practical rule to hold that the loss of a deed recited, *throws no considerable doubt upon the title of the vendor, and that the purchaser must complete his purchase.

29. It was debated, but not decided, in *Fain v. Ayers* (*d*), whether under a covenant for further assurance a purchaser who has not obtained the title-deeds or a covenant to produce them, can require a covenant to produce them to be executed to him. But the better opinion is, that he has no such right, for the covenant for further assurance seems to be confined to an assurance by way of conveyance, and not to extend to further obligations to be imposed on the covenantor by way of covenant (*e*).

30. If a purchaser take a conveyance from an heir at law, by

(a) *Cottrell v. Watkins*, 1 Beav. 361.

(d) 2 Sim. & Stu. 533.

(b) *Bennett v. Ingoldsby*, Finch, 262.

(e) See *Hallett v. Middleton*, 1 Russ.

(c) 6 Mudd. 59.

256, 257.

deeds which set forth the pedigree of the vendor, he cannot afterwards file a bill stating that there are various books, family Bibles, &c., containing entries which prove the pedigree as recited, and insisting on that ground that those books, Bibles, &c. ought to be delivered up to him or secured for his use. If he was satisfied at the time when he took his conveyance, he cannot afterwards call for proof of its accuracy (*f*).

31. So if the validity of a conveyance depend upon a certain amount of debt being due, and the purchaser take the conveyance with a recital that the requisite amount of debt is due, he cannot, although he have a covenant for further assurance, file a bill against his seller, admitting the recital to be correct, to have an account of the debts taken, or to have the documents which show the state of those debts delivered to him or deposited in safe custody, or to have a covenant for their production (*g*).

32. But if there have been any fraud or misrepresentation regarding a document which relates to the title, equity will after the conveyance relieve the purchaser. Therefore where upon a purchase it was erroneously represented to the purchaser that a will affecting the estate had been proved in an ecclesiastical court, to which of course he could always have had resort, the Court, upon a bill filed by the purchaser after the conveyance, ordered the will to be deposited with the Master for the benefit of both parties; and although the misstatement was probably a mere mistake, and not intentional, yet as it rendered the suit necessary, the decree was made with costs (*h*).

33. A vendor, unless some special ground be laid for it, is never called upon to prove the execution of the title-deeds (1). And even if the seller bring an action, yet the title-deeds need not be proved (*i*). *This was decided by Lord Kenyon at *nisi prius*. To prove the plaintiff's title to a right of way sold, the deeds were produced, and it was objected that the deeds themselves should first be made evidence by producing the subscribing witnesses. But Lord Kenyon ruled it not to be necessary. He said he never would allow, where the question was respecting a title, that the party should be called upon to prove the execution of all the deeds deducing a long title; that it was never mentioned in the abstract.

(*f*) *Per* Master of the Rolls, 1 Russ. 256.

(*h*) *Harrison v. Coppard*, 2 Cox, 318.

(*i*) *Thompson v. Miles*, 1 Esp. Ca. 184.

(*g*) *Hallett v. Middleton*, 1 Russ. 243.

(1) See ante, 453, in note; *Morris v. Wadsworth*, 17 Wendell, 103.

or expected in making out a title in any case of a purchase, more particularly where possession has accompanied them; he therefore admitted them without proof of their execution. In a late case before Lord C. J. Mansfield, at *nisi prius*, where in assumpsit upon an agreement to purchase a leasehold house, it appeared, that the plaintiff, the vendor, was a third or fourth assignee of the term; and it was contended, that he need only prove the execution of the last assignment: it was ruled otherwise; and he was compelled to prove the lease and all the mesne assignments (*k*). Lord Kenyon's decision was not however adverted to; and as that clearly coincides with the practice in these cases, it can scarcely be considered as overruled.

34. In the last case upon this subject (*l*), where the conditions of sale of a leasehold house stipulated that the purchaser should not require the production of any title prior to such lease; the purchaser refused to complete the contract, on the allegation that he had bid only at the seller's request. The seller, who brought the action for damages, was the assignee of the lease, and he proved at the trial the execution of the assignment by an attesting witness, but offered no proof of the execution of the lease itself; and it was held that he ought to have proved the execution of the latter. The Court observed, that, generally speaking, on occasion of purchases of this nature, an abstract is delivered, on which a correspondence or communication by word of mouth takes place, and in most cases the question, if any arises, is on the law as it affects the title disclosed. Under such circumstances, a party having admitted the deeds to be authentic, and the legal effect of them as to title being the only matter in dispute, is not permitted to turn round at the trial and require proof of the genuineness of the deeds themselves. In the present case nothing had taken place but a bare delivery of the abstract; no correspondence or communication on points of title; nothing which showed an intention, or had the legal effect, on the part of the defendant, of *admitting the genuineness of the deed, and therefore the lease required to be proved. The instrument which the plaintiff had failed to establish in proof was the foundation of his action — the very thing sold.

35. The Court, in the last case, professed not to decide the point discussed in the former cases. But, as we have seen, they laid down one important rule, which applies to the great majority

(*k*) *Crosby v. Percy*, 1 Camp. Ca. 303. (*l*) *Laythoarp v. Bryant*, 1 Bing. N. C. 421.

of cases arising out of contracts, for few become the subject of an action without some preliminary discussion. The Court observed, that they did *not* say that where the seller holds the lease himself he is bound to prove *all* the *mesne* assignments, but he ought to show that the lease was a valid subsisting instrument, that being the very subject of the sale. This case not only establishes an important general rule, but also furnishes a rule applicable to sales of leaseholds. In the case of a freehold estate it would probably be deemed sufficient, — although there had been no previous communication on the title, the result of which showed that the objection did not turn upon want of proof of the execution of the deeds, — to prove the execution of the conveyance of the fee to the seller, unless the purchaser could show that some of the prior deeds, not thirty years old, from being written on erasures, or the like, might justify the call for evidence to establish their execution.

36. The case of *Nash v. Turner (m)* does not apply to this question, for the action there was by a purchaser against the seller to recover a sum of money paid for fixtures, which had been sold without any title. *The seller was the original lessee*, and the plaintiff claimed under an assignment from him. The assignment was endorsed on the lease, and the assignment was proved by the subscribing witness, but not the original lease; and Lord Kenyon ruled that the proof of the assignment was sufficient. It will be observed, that the lease was the defendant's own title; *the assignment from him* to the plaintiff was duly proved.

37. Where a will has been executed it must be produced before a purchaser can be compelled to accept the title, although, having been treated as a nullity by a professional man, it has been mislaid, and the seller, being heir, has rested upon his title as heir (*n*).

38. Formerly, where a vendor claimed under a modern will, by which the heir at law was disinherited, it was usual to require the will to be proved in equity against the heir at law (*o*): but this *practice is now discontinued. In the case of *Colton v. Wilson (p)*, the purchaser was in the first instance discharged from his purchase on account of the will not being proved against the heir at law: but on a rehearing he was compelled to take the title. This decree however, was made on the particular circumstances of the case, and

(m) 1 Esp. Ca. 217; see 1 Camp. Ca. 303.

(n) *Stevens v. Guppy*, 2 Sim. & Stu. 439.

(o) See Fearn's Posthuma, 234. See

Harrison v. Coppard, 2 Cox, 318, as to the custody of the will.

(p) 3 P. Wms. 190; and see *Mackrell v. Hunt*, 2 Madd. 34, n.

the point was by no means settled. But in *Bellamy v. Liversidge* (q), the title received the Master's approbation, although the will was not proved against the heir at law ; and upon exceptions to his report on that account coming on, Lord Kenyon, then Master of the Rolls, overruled them.

39. It is not unusual to require the heir at law to join in the conveyance, if his concurrence can be easily obtained ; and where he is a party to a conveyance in any other character, he is invariably made a conveying party, in his character of heir at law ; although, in strictness, this could not be insisted upon.

40. If it should even be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes* (1). The objection, therefore, under any construction, could only be set up by a purchaser, as a *defence* to a specific performance ; and even to that extent it would not now prevail.

41. We have still to consider, which we may do in this place, whether the title-deeds will pass with the estate by a conveyance to a purchaser operating by way of use, where the seisin is in a third person.

42. It is said that as the statute of uses only transfers the legal estate to the use, it does not interfere with the title-deeds, and therefore the feoffee or grantee is entitled to the custody of them (r). Certainly there is considerable authority for this statement, but there is hardly one case in which it was necessary to decide the point (s) ; and it has been questioned by Lord Hardwicke, who said, that though it was so clearly established, he knew not but, when it was considered, it might be called a spungy reason, as Lord Vaughan says (t), and it has since been doubted by Mr. Hargrave (u). The authorities make no distinction between feoffees *or grantees and covenantees, or, in other words, between conveyances which operate by transmutation of possession and those which do not. Now the statute not only provides that where one person

(q) Chan. 1 June 1783, MS. ; and see *Wakeman v. Duchess of Rutland*, 3 Ves. jun. 233 ; 8 Bro. P. C. 145 ; *see* vide *Smith v. Hibbard*, 2 Dick. 730.

(r) 1 Sand. Uses, 119 ; Sug. Gilb. Uses, 186, n.

(s) *Estofte v. Vaughan*, Dy. 277 a, pl.

58 ; *Sa chevel v. Bagnoll*, Cro. Eliz. 356 ; *Lord Huntington v. Mildmay*, Cro. Jac. 217 ; *Stockman v. Hampton*, Cro. Car. 441 ; *Reynell v. Long*, Carth. 315.

(t) See *Whitfield v. Fausset*, 1 Ves. 394.

(u) Co. Litt. 6 a, n. 25.

(1) As to proof of wills see 1 Jarman, Wills, (2d Am. ed.) Ch. 9, p. 210 et seq.

stands seised to the use of another, the latter shall be deemed in the lawful seisin, estate and possession to all purposes in the like estate as the former had to the use, but proceeds to divest the estate title and right, that was in such person, and to vest it in the *cestui que use*. This therefore is a legislative conveyance to the *cestui que use*, as powerful as the common law conveyance to the feoffe to uses; and as the latter conveyed to him the right to the deeds, although they were not granted, so the former ought to have as powerful an operation in transmitting them with the estate from him to the *cestui que use*. The opinion that in the case of a covenant to stand seised for the consideration of blood with strangers, the deed does not belong to the relation who takes the estate, but to the covenantees, and that he has no means to obtain the deed (x), shows how little principle was adhered to, for in that case the deeds were held to belong *not to the person who took the estate*, but to the persons who did not, and had not even any seisin vested in them; for in such cases the uses are served out of the covenantor's own seisin, and there is no *transfer* of the legal estate out of which the statute is to serve the uses.

43. The cases have led to the practice of granting the deeds by the conveyance to a purchaser, and where uses are created, and he is not the releasee to uses, of making the grant to him, his heirs and assigns. This is a practice which the author never adopted, and no evil is likely to arise from disregarding it, although, certainly, a case may arise in which the actual grant of the deeds may have some influence upon a purchaser's right to them.

44. In *Yea v. Field*, Lord Kenyon laid stress upon the circumstance that the assignee of a mortgage had not a grant of the deeds (y). Part of a leasehold estate, the whole of which was held under one title, was in mortgage, and the mortgagee held the deeds. The owner sold the part not in mortgage, and gave to the purchaser a covenant from himself to produce the title-deeds. The purchaser afterwards paid off the mortgage and took a transfer of it, and obtained the delivery to him of all the deeds. He then assigned the mortgage to a third person without any actual grant of the deeds, and without delivering them over, and upon trover brought by the latter assignee against the assignor to him (the purchaser), Lord Kenyon said, that although, at the time of the *purchase, the defendant had no right to the possession of the deeds, yet since that time

(x) *Stockman v. Hampton*, Cro. Car. 411.

(y) 2 Term Rep. 798; see *Hobson v. Mellond*, 2 Mood. & Rob. 542.

they had by accident come into his possession, and the plaintiff could not recover them from him. To entitle the plaintiff to recover, he should have a better right to the deeds than the defendant, *but in the assignment to him there was no grant of them.* In old conveyances there is a reservation made of such deeds as tend to deraign the warranty paramount.

45. This decision can hardly be supported, for the estate was divided into two parcels, one of which was not in mortgage, and was sold with a covenant to produce the deeds, but without any right to the deeds themselves, — the other parcel remained the property of *the seller* and of his mortgagee. Now no one could acquire, by taking a transfer of the mortgagee, a greater right than the mortgagee, and he had no right to the deeds *except as mortgagee.* Under the first transfer, the purchaser of the other part obtained the legal estate in the part mortgaged, and the deeds *as mortgagee*; when therefore he assigned in that character, the deeds passed with the land without the necessity of any grant: the *legal* right to them went with the mortgage; but the effect of the decision in the King's Bench was, that the second assignee, when he came to be paid off, would not have it in his power to deliver back the deeds to the mortgagor, to whom they belonged, and who was under covenant to produce them. It was a mistake to mix together the two characters of the defendant as purchaser of one part and mortgagee of another—they were altogether distinct; and the observation, that in the assignment to him there was no grant of the deeds, ought rather to have been applied to the assignment to the purchaser of the part sold, than to the assignment by him of the portion mortgaged. The want of a grant of the deeds to himself was proved, by the covenant to produce them, to have been omitted, because it was not intended that he should have them, and his claim therefore was not authorized in his character of a mortgagee who had assigned over, nor in his character of a purchaser who, by contract, was precluded from claiming them.

*SECTION V.

OF THE PRODUCTION OF DEEDS IN EQUITY AND AT LAW.

- | | |
|---|---|
| 2. <i>Settlement relating to property of several owners: partition.</i> | 14. <i>Fraud by tenant for life.</i> |
| 3. <i>Right of purchaser where he has no covenant to produce.</i> | 15. <i>Mortgagee in fee under tenant for life, with the deeds.</i> |
| 4. <i>Tenants in common, &c.</i> | 16. <i>Ejectment bill for deeds.</i> |
| 5. <i>Holder of deeds becoming mortgagee.</i> | 17. <i>Production of deeds in a suit.</i> |
| 7. <i>Tenant for life and remainder-man.</i> | 19. <i>Where the conveyance is impeached.</i> |
| 8. <i>Tenant for life parting with deeds, &c.</i> | 20. <i>Production at law.</i> |
| 9. <i>Remainder-man no right to have deeds brought into Court.</i> | 21. <i>Mortgagee consenting to sale.</i> |
| 10. <i>Remote remainder-man.</i> | 23. <i>Production of title-deeds not compelled at law.</i> |
| 11. <i>Contingent remainder-man.</i> | 24. <i>R. P. Commissioners' opinion on want of possession of deeds.</i> |
| 12. <i>Father and son.</i> | 25. <i>Observations thereon.</i> |
| 13. <i>Mortgagee under remainder-man with-</i> | |

1. WE have yet to consider in what cases equity will compel the owner of title-deeds to produce them to other persons, and in what cases their production will be compelled in adverse suits and actions.

2. Although the rule is not universal, and may be affected by circumstances, yet where several parties are entitled to property held under one settlement, and one has possession of it, a court of equity will order it to be brought into court for the benefit of both parties (*a*). So where an estate is divided upon a partition, and a counterpart of a lease of the whole is delivered to one of the parties, the parties entitled to the other shares would be entitled to the production of the counterpart, in order to enable them to proceed against the tenant if necessary (*b*).

3. So where a person sold a part of his estate with the usual covenants for title, including a covenant for further assurance, but without any covenant to produce the title-deeds, all of which he retained; upon a bill filed by the purchaser, who had resold,

(*a*) Lord Banbury v. Briscoe, 2 Cha. 318.
 Cha. 42; Harrison v. Coppard, 2 Cox.

(*b*) Shore v. Collett, Coop. 234.

praying alternatively either a deed of covenant to produce, or the actual production of the title-deeds, to show a marketable title *upon his resale, the Vice-Chancellor observed, that whatever doubt there might be upon the right to a covenant to produce the defendant's title-deeds, being the root of the plaintiff's title, and in that sense a sort of common property, he strongly inclined to think that the plaintiff had an equity to the extent of the production of the deeds, and he was informed that the Lord Chancellor had expressed an opinion to that effect, and therefore he overruled a demurrer by the defendant to the plaintiff's bill (c). And this certainly, speaking from recollection, was Lord Eldon's opinion.

4. At law, where there are tenants in common, joint-tenants or coparceners, whichever obtains possession of the deeds may retain them; but upon proper occasions in proceedings by the others at law, the production of them would be compelled; and in equity, there is no doubt that in such a case the Court will, upon a bill filed, order the production of the title-deeds in the hands of either for the other's inspection, where he has sold his share, or upon any other occasion (d).

5. But if before the bill filed the person holding the deeds has changed his character, from the absolute owner to that of a mortgagee, although the deeds have never been out of his possession, the Court will not compel him to produce them, for the estate is the purchaser's who made the mortgage, and a mortgagee has no right to show his mortgagor's title (e).

6. This, however, is a difficulty which can be obviated readily: the purchaser as well as the seller (the mortgagee) should be made a party to the suit, and the order will be of course, for the purchaser will be equally bound with the person from whom he purchased.

7. As regards persons claiming several interests in the same estate, it is perfectly settled that the tenant for life is the person entitled to the custody of them; and if they have been taken into the Court of Chancery for a purpose which is satisfied, they will be delivered out to him (f), although, if the grantor deliver the

(c) *Fain v. Ayers*, 2 Sim. & Stu. 533, *supra*; *sed qu.*

(d) *Lambert v. Rogers*, 2 Mer. 489; see *Shore v. Collett*, Coop. 234; *Burton v. Neville*, 2 Cox, 242.

(e) *Lambert v. Rogers*, 2 Mer. 489; see *Hercy v. Ferrers*, 4 Beav. 97; *Balls v. Margrave*, ib. 119.

(f) *Webb v. Webb*, 1 Eden, 8; *Strode v. Blackburne*, 3 Ves. jun. 225, 226; *Duncombe v. Mayer*, 8 Ves. jun. 320; *Churchill v. Small*, ib. 32, n.; *Bowles v. Stewart*, 1 Scho. & Lef. 222; *Banbury v. Briscoe*, 2 Cha. Ca. 42; see *Doe v. Samples*, 8 Adol. & Ell. 151.

deeds to the remainder-man, the tenant for life could not recover them (*g*), for of course the absolute owner of land may sell or give away the title-deeds as mere parchments, or destroy them at his pleasure (*h*). And it is laid down in early times, that if there be tenant for life, the remainder over by deed, whichever of them first obtains the deed shall retain it; and that therefore, whoever has any land comprised in the deed, where others have the rest of the land, yet he who has a portion may, in respect of it, retain the deed (*i*).

8. Where the tenant for life has parted with the deeds to persons not entitled to the land, and so is satisfied, and does not care about the title, but the remainder-man is not satisfied, equity will secure the title-deeds for the remainder-man (*k*); or, if proper, they would be secured where the right to the remainder is in dispute, and a bill is filed to have it declared (*l*). So clearly, in cases of spoliation; and in the case of a jointress, the deeds may be obtained by the remainder-man upon confirming her jointure (*m*). And there are dicta that every remainder-man has a right in equity to have the deeds brought into Court (*n*).

9. But, nevertheless, there is not a single decision that way, but the rule is settled the other. Lord Kenyon laid it down, that a remainder-man had not any action at law, or any equity, to take the deeds out of the hands of the tenant for life (*o*).

10. And it has been decided, that where the person claiming to have the deeds produced, has only a remainder expectant upon prior estates for life, with limitations to children not *in esse* in tail, such an interest is too remote to warrant the interference of the Court; for if such a practice were suffered to prevail, the title-deeds of half the estates in the kingdom might be brought into Court (*p*).

11. So, where the remainder was contingent, and indeed so circumstanced that it might be barred; the Court refused to compel the tenant for life to produce the title-deeds. It was admitted that there was no authority to show that a *contingent* remainder-

(*g*) 2 Bro. Ab. 84 b, pl. 25.

470.

(*h*) 1 Bro. Ab. 327 b, pl. 86; Co. Litt. 232 a; Kelsack v. Nicholson, Cro. Eliz. 496.

(*m*) See 2 Ves. 450; 2 Bro. C. C. 652; 1 Ves. jun. 76.

(*i*) 4 H. 7, 10; 1 Bro. Ab. 138 b, pl. 53; see 2 Dick. 650, 651.

(*n*) Reeves v. Reeves, 9 Mod. 132; 1 Atk. 431; Smith v. Cooke, 1 Atk. 382.

(*k*) Ford v. Peering, 1 Ves. jun. 72. [Sumner's ed. note (*u*).]

(*o*) Knott v. Wise, 8 Ves. jun. 323, cited.

(*l*) Southby v. Stonehouse, 2 Ves. 510; see Papillon v. Voice, 2 P. Wins.

(*p*) Ivie v. Ivie, 1 Atk. 429; see Joy v. Joy, 2 Eq. Ca. Abr. 284; probably an imperfect note of the same case.

man had that right. And an inspection of the deeds was refused to a purchaser from the contingent remainder-man (*q*).

12. And in cases between father and son, where the former is tenant for life, and the latter tenant in tail, whether the settlement *was made by the grandfather (*r*) or by the father (*s*), the Court will not without a special case order a production of the deeds; for between father and son, the Court has always suffered the settlement to remain with the father for the benefit of the family, unless he has threatened or intended to destroy it (*t*).

13. And as the tenant for life cannot be compelled to give up the deeds, a first mortgagee under the remainder-man cannot be postponed because he did not obtain the deeds in favor of a second mortgagee who did obtain them, for he was guilty of no laches, and even if he do not file a bill for the deeds, as he might do after the death of the tenant for life, yet that omission will not be sufficient to charge him (*u*).

14. The possession of the title-deeds by the tenant for life, in many cases would enable him to commit a fraud by making a mortgage, as where he himself made the settlement, for by suppressing the settlement he would still appear to be owner of the fee, and this mischief will be increased now that a man can bar his wife's dower, for it will no longer be necessary to have the concurrence of the wife, which would lead to a knowledge of the settlement. To avoid a possible fraud in such cases, a memorandum of the settlement should be endorsed on the conveyance to the settlor, or if none, on the leading title-deed remaining in his possession.

15. Where a tenant for life, who had been owner of the fee, made a mortgage, suppressing the settlement, and delivered the title-deeds to the mortgagee, Lord Rosslyn was so struck with the hardship of the case upon the remainder-man under the settlement, that he directed a plea of purchase without notice to stand, merely as an answer to the bill which was filed by the next tenant for life to have the title-deeds delivered up; and he seemed to consider that the defendant was not justified in retaining that with regard to which she could have no profit, thereby putting the tenant for life under a disadvantage; and that if there were none of which the mortgagee could make any advantage, she was with-

(*q*) *Noel v. Ward*, 1 Madd. 322, 339.

(*r*) *Pyneent v. Pyneent*, 3 Atk. 571.

(*s*) *Lord Lempster v. Lord Pomfret*,
Ambl. 154.

(*t*) See 2 Dick. 239.

(*u*) *Tourle v. Rand*, 2 Bro. C. C. 650;

see *Farrow v. Rees*, 1 Beav. 18.

out any beneficial interest or profit to herself, retaining what might be a profit or advantage to the tenant for life (v) ; but Lord Eldon expressly overruled this decision, and held that the mortgagee, although he could not maintain his title at law to the estate, could not be compelled in equity to discover whether he had the title-deeds, or to deliver them up (y). In such a case, therefore, *the remainder-man must obtain elsewhere what evidence he can in support of an action of trover. Of course a purchaser from a tenant for life would stand in the same situation with a mortgagee who is a purchaser *pro tanto*.

16. In regard to general relief in equity for deeds, an ejectment bill, as it is termed, cannot be maintained, although the claimant has not the title-deeds. In a case in which an heir at law, out of possession, filed a bill praying relief by the delivery of the possession of the estate, and of the title-deeds, the Court observed, that it was said that the delivery of title-deeds was equitable relief, and that the Court having in that respect jurisdiction, would do complete justice [which certainly had been a prevailing opinion]. The possession of title-deeds was incidental to the possession of the estate, but could not be recovered with the estate at law. The Court therefore would give the title-deeds to him who had at law recovered the possession of the estate, but its jurisdiction in this respect was confined to the possessor of the estate. If the plaintiff in this case, the Court added, recovers the estate at law, then, and not till then, he may come here for the possession of the title-deeds (z).

17. In suits in equity, the Court, as between the parties to the suit, does not order the production of deeds but on a very strong case of unanswerable equity. The defendant, the owner of the documents, never can be called on to give any reason why he should not produce them, for all must depend on the plaintiff's ground of application, and the defendant needs no other protection than the jealousy of the Court. It is a doctrine of the greatest moment to titles, that a party should not be compellable to produce his securities. What would otherwise become of our property ? (a).

18. The general rule is, that the plaintiff is entitled to the production of a deed which sustains his title, but he has no right to

(x) *Strode v. Blackburne*, 3 Ves. jun. 222.

(y) *Walwyn v. Lee*, 9 Ves. jun. 21.

(z) *Crow v. Tyrrell*, 3 Madd. 179 ; *Jones v. Jones*, 3 Mer. 161.

(a) *Vansittart v. Barber*, 9 Price, 611, *per* Richards, C. B.

the production of a deed which is not connected with the title, and which gives title to the defendant (*b*) (1), as where it shows constructive notice (*c*). An heir in tail may obtain the production of the deeds creating the entail, but nothing further (*d*) (2). And a positive *denial of the plaintiff's title, and that the documents in the defendant's possession would not show his title, will prevent the Court from ordering the production of the documents (*e*).

19. Even where the bill is filed to impeach the conveyance to the purchaser on the ground of fraud, although the Court will order the production of the deed at the hearing (*f*), yet it will not compel its production before that period, where the purchaser denies the alleged fraud (*g*), unless the fraud appears on the deed itself; as for example, where from the peculiar manner in which the receipt was signed, the deed having been folded down so that the plaintiff could not see what she was going to sign, and the purchaser, though he said he was a purchaser for valuable consideration, without notice of the fraud, did not deny that he had notice of these circumstances; the Court ordered the production of the assignment to the purchaser (*h*). So where the fact of notice appeared from the recitals in the deed, as set forth in the answer, it was ordered to be produced before the hearing (*i*).

20. And even at law, it seems that a person, though no party to a deed, who takes an estate by way of remainder under it, has a strong interest in the deed and is entitled to the production of it (*k*). But this is the case of different interests in the same estate, and not of distinct rights to different estates comprised in the same deed, and the general rule is at law, that unless the party holding the deed has been in effect a trustee for the party requiring the production of

(*b*) *Sampson v. Swettenham*, 5 Madd. 16; 2 Myl. & Kee. 754, n.; *Wilson v. Forster*, You. 280; see *Hardman v. Ellames*, 2 Myl. & Kee. 745, *contra*, where referred to by the answer when produced; but see *Wigram, Disc.* 114. See *Farrer v. Hutchinson*, 3 You. & Coll. 692; *Smith v. Duke of Beaufort*, 1 Hare, 507; *Llewellyn v. Badeley*, 1 Hare, 527; *Bennett v. Glossop*, 3 Hare, 578.

(*c*) See 2 Hare, 166, n.

(*d*) *Lord Shaftesbury v. Arrowsmith*, 4 Ves. jun. 66; see *Codrington v. Codrington*, 3 Sim. 522; *Attorney-general v. Ellison*, 4 Sim. 240; *Herey v. Ferrers*,

4 Beav. 97.

(*e*) *Bannatyne v. Leader*, 10 Sim. 230.

(*f*) *Beckford v. Wildman*, 16 Ves. jun. 438; see *Balch v. Symes*, Turn. & Russ. 87.

(*g*) *Tyler v. Drayton*, 2 Sim. & Stu. 309; 2 Myl. & Kee. 754, n.; *Carr v. Moulds*, 1 Hayes & Jo. 714; *Bassford v. Blakesley*, 6 Beav. 131.

(*h*) *Kennedy v. Green*, 6 Sim. 6; see *Fencott v. Clarke*, *ib.* 8.

(*i*) *Negson v. Clarkson*, C. Coop. 93; see *Addis v. Campbell*, 1 Beav. 258.

(*k*) *Per Heath, J.*, in *Bateman v. Phillips*, 4 Taunt. 161.

(1) 2 Story Eq. Jur. §1490.

(2) *Ib.* §1491.

it, he cannot call for it (*l*). If a purchaser were to complete his purchase and leave the deeds in the hands of the seller, who retained other estates held under them, without taking any covenant to produce them, he would have no remedy at law to enforce their production. This has always been considered the rule in practice.

21. Mortgagees, generally speaking, cannot be compelled to produce the deeds until they are paid off, but if they consent to be paid off by means of the purchase-money to be produced by sale of the property in a suit, they become bound to facilitate the *sale, and therefore the deeds will be ordered into Court, although they will not be delivered out without notice to the mortgagee (*m*).

22. If one part of a deed has been executed for both parties, or a deed has been deposited in the hands of the holder as a trustee for others only, or for others jointly with himself, its production may be compelled (*n*).

23. But generally, parties are not compelled to produce their title-deeds at law. If a subpoena *duces tecum* is served, the party must take his deeds into Court in obedience to the subpoena, but if he states that they are his title-deeds, no Judge will ever compel him to produce them (*o*). Lord Kenyon observed, that if a man were obliged to produce every paper in his custody, it would occasion the ruin of millions. It was, he added, a good plea in bar in the Court of Chancery, that the defendant (although the legal title was in another) had an equitable title by honest means without notice, and the Court would not compel the production of those papers which, if produced, would strip the defendant of his fair and equitable title (*p*); nor can a man's attorney be compelled to produce a muniment of title which his client might withhold, and the Judge has no more privilege to examine the document than any one else (*q*).

24. In estimating the merits of a general registry, the real property commissioners have, no doubt unconsciously, been led to greatly overrate the difficulty arising from the want of possession of the deeds. They say (*r*), that when the covenant to produce them is obtained, it is only *in very few cases* that it is permanently effectual. The deeds often pass with the lands in respect of which

(*l*) See *Street v. Brown*, 6 Taunt. 302; *Ratcliffe v. Bleasly*, 3 Bing. 148; *Lord Portmore v. Goring*, 4 Bing. 152; *Cocks v. Nash*, 9 Bing. 723.

(*m*) *Livesey v. Harding*, 1 Beav. 343.

(*n*) See 1 Barn. & Cress. 263.

(*o*) *Pickering v. Noyes*, 1 Barn. & Cress. 262.

(*p*) *Miles v. Dawson*, 1 Esp. Ca. 405; *Harris v. Hill*, 3 Stark. Ca. 140; *Nixon v. Mayoh*, 1 Mood. & Rob. 76.

(*q*) *Doe v. James*, 2 Mood. & Rob. 47.

(*r*) Second Report, p. 16.

they were retained into the hands of a person not bound by the covenant, and on the other hand, the subsequent purchaser of the other lands is seldom able to enforce the covenant. These cases depend upon the general law of covenants, which is ill adapted to purposes of this nature, and often gives rise to questions of the greatest nicety and difficulty. When the covenant is imperfect, the party interested in the deeds is often unable to enforce the production of them from the holder, and still oftener he is unable to secure to a purchaser their future production. The consequence in either case is, that the title is unmarketable. Supposing, they add, the party to be in possession of a perfect covenant, it may fail of *effect, because the party bound by the covenant may not be known, or may be out of reach, or may be incapable of being sued, and there is also the risk of the loss of the deeds. The loss of the deeds or the want of an effectual covenant for the production of them, *prevents a large proportion of the titles in this country* from being strictly marketable.

25. Now, it is believed, that it is only in very few cases that the covenant to produce deeds is not permanently effectual, whether the covenant run with the land or not, for the covenant binds the deeds in equity, and they and not damages are what the party wants, and therefore an action for breach of the covenant is not the remedy resorted to. Where the deeds pass with the land in respect of which they were retained into the hands of any person, he would be bound, at least in equity, by the covenant, and in practice, where there is a covenant to produce, there is *not*, speaking generally, any difficulty in obtaining the production of them. I remember well when these difficulties were not raised upon purchases, and they have been created not in consequence of any practical obstruction, but from refining on the nature of the covenants, and the liability under them. The difficulty may be altogether removed by common care upon purchases, and by a steady adherence to principle in the decisions of the courts. Such observations as those we have been considering are to be deprecated, as they tend to increase litigation on these points, and to encourage objections by purchasers which are not warranted by law:—they create the very difficulty upon which they assume to be grounded.

*SECTION VI.

OF ATTESTED COPIES AND COVENANTS TO PRODUCE DEEDS.

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| 2. Purchaser entitled to attested copies. | 17. What deeds it should comprise. |
| 3. Unless on record. | 18. Whether a covenant to produce can be enforced under covenant for further assurance. |
| 6. Any of them if in seller's custody. | 19. By whom to be entered into. |
| 7. Covenant to produce copies of court roll. | 20. The covenant runs with the land purchased. |
| 8. Or bargain and sale enrolled. | 21. R. P. Commissioners' observations on Barclay v. Raine. |
| 9. Right to attested copies excluded by agreement to produce deeds, qu. | 22, 24. Rule in equity. |
| 11. Purchaser entitled to covenant to produce. | 23. Barclay v. Raine. |
| 12. Although the sellers are assignees. | 25. Observations on the law of that case. |
| 13. Equitable right to production insufficient. | 26. Validity of title in that case. |
| 14. Seller having only a covenant to produce. | 27. Whether the covenant runs with the land retained by the seller. |
| 16. Covenant, how framed as to copies. | 28. How covenant affects a marketable title. |

1. HAVING considered generally to whom the custody of the title-deeds belongs, we are now to consider in what cases a purchaser is entitled to attested copies of the title-deeds.

2. If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary (a); and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose (b).

3. But a purchaser is not entitled to attested copies of instruments on record.

4. This was decided in the case of *Campbell v. Campbell* (c), where the Master, in taxing costs incurred by the sale of considerable estates, disallowed the charges for attested copies of deeds

(a) *Dare v. Tucker*, 6 Ves. jun. 460; *Berry v. Young*, 2 Esp. Ca. 640, n.

(b) *Berry v. Young*, *ubi sup.*; vide *sup.*

(c) Rolls sittings after — Term, 1793, MS. See *Cooper v. Emery*, 10 Sim. 609.

and documents upon record; and upon exceptions to his report on that account coming on, the Master of the Rolls overruled them, and held that a purchaser was not entitled to such copies at the expense of the vendor.

*5. The rule must have proceeded, it should seem, upon this ground, that the purchaser having had the inspection of the originals, and procured a covenant to produce them, was not entitled to an attested copy, because, being upon record, he could always inspect the record in the absence of the original, for attested copies are given rather for general use than as muniments of title, which they are not. There is a great distinction between a deed properly on record, as a bargain and sale, which derives its operation from the enactment, and is therefore evidence without further proof, and a deed enrolled only for safe custody, which is evidence without further proof only against the party who sealed it, and all persons claiming under him (*d*). But the question between the seller and purchaser is not how the original, when it is produced, can be proved, but whether the latter shall have *any* evidence of the contents in his own possession: it is no reason why a purchaser who has not the custody of the original, should not have an attested copy of it, that the original when produced can be proved with less ceremony or difficulty than in a common case: the original in either case is out of his immediate reach, and an attested copy for ordinary purposes supplies its place. The true distinction must be between what is in private custody and what is of public access; it was thought that if a purchaser could at all moments have access to a copy in a public office, he would not be entitled to an attested copy. The rule, therefore, seems to extend to instruments not strictly of record, as deeds enrolled for safe custody in a court of record, or wills registered and accessible, which latter, although not in a court of record, yet in common parlance are treated as on record.

6. In some cases, however, a purchaser can obtain attested or office copies even of instruments on record. For a purchaser is entitled to examine the abstract with the original title-deeds, or with office or attested copies of them; and, therefore, if a vendor has not the instrument itself, and cannot obtain it, and can make a title without producing the deed itself, he is bound to procure an office or attested copy of it, to enable the purchaser to ascertain that the abstract is correct; and when it is obtained, the pur-

(*d*) *Lady Holcroft v. Smith*, 2 Freem. 259; see *Phil. Evid.*

chaser is of course entitled to it on the completion of the purchase : unless, indeed, the vendor retains other estates holden under the same title.

7. When the estate is copyhold, and the purchaser is not entitled to the custody of the copies of court roll, he is entitled to a covenant to produce them, if the vendor has them, or if they are in *his power ; but if not, the purchaser cannot require such a covenant (e).

8. So a bargain and sale enrolled under the statute 10 Anne. c. 18, falls within the same principle as copies of court roll (f).

9. In a case before Lord Rosslyn, where there was an agreement that the vendor should produce the original title-deeds, he construed it, not only as an engagement to produce the title-deeds, but as a negative stipulation that he should not give attested copies. This was certainly presuming a great deal. Lord Eldon thought that the pressure of the stamp duties led to that decision (g) ; and it is probable that a similar case would now receive a different determination.

10. In a case before Lord Eldon, he compelled the vendor, at his own expense, to furnish attested copies, the purchaser having had no intimation that he could not have the deeds. For, he said, if he had notice that he was not to have them, he would regulate his bidding accordingly ; conceiving that he was to bear the expense of procuring copies (h). From this, it may be inferred, that notice that the purchaser cannot have the deeds is tantamount to a stipulation that he shall not be furnished with attested copies at the seller's expense. The general practice of the Profession, founded on the decided cases, is, that the seller, in the absence of an express stipulation to the contrary, is bound, at his own expense, to furnish the purchaser with attested copies ; and Lord Eldon does not appear to have intended to establish a new rule.

11. Where a purchaser cannot claim the title-deeds, it is of importance to him to obtain attested copies of them. But attested copies are not of themselves sufficient security to a purchaser.—they are indeed mere waste paper against strangers, and cannot be used upon an ejectment, unless, perhaps, as between the

(e) *Cooper v. Emery*, 1 Phil. 388. As to attested copies of them, see S. C., and 10 Sim. 609.

(f) S. C.

(g) See 6 Ves. jun. 460.

(h) *Boughton v. Jewell*, 15 Ves. jun. 176.

parties themselves (*i*). Therefore, in order to enable a purchaser to effectually manifest and defend his title and possession, he is also entitled, at the expense of the vendor, to a covenant to produce the deeds themselves, at the expense of the purchaser (*k*); which should, in most cases, be carried into effect by a separate deed. And where a vendor retains the deed by which the estate he is selling was conveyed to him (which is mostly the case when it relates to other estates), it seems advisable for the purchaser to *require a memorandum of his purchase to be endorsed on such deed.

12. And where the title-deeds cannot be delivered, assignees must, like any other vendor, give attested copies of them at the expense of the estate, but their covenant for the production of the deeds should be confined to the time of their continuance as assignees (*l*). If, however, the covenant is so confined, the purchaser should have some security that the person who shall ultimately become entitled to the custody of the deeds will covenant for their production. The proper course seems to be for the assignees' covenant to be made determinable in case they shall procure the person to whom they shall deliver the deeds to enter into a similar covenant with the purchaser (*m*).

13. A purchaser is not, it is said, bound to rely upon an equitable right to compel the production of the deeds, but is entitled to the deeds, or a valid covenant to produce them (*n*).

14. It frequently happens, that a person having a covenant for production of the title-deeds to his estate, sells only part of the estate, and retains his purchase-deed, and the covenant to produce the deeds; and in such cases I should conceive the practice to be for the vendor to enter into the usual covenant for production of the title-deeds in his possession, which of course would include the original covenant to produce the deeds. But Mr. Fearne thought (*o*) that a purchaser was, in cases of this nature, entitled to require the vendor to covenant for the production of the deeds to such an extent as the covenant in the vendor's possession entitled him to the production thereof, unless he could procure a new covenant for that purpose from his grantors to the new purchaser; but that such covenant from the vendor should not be enforced, in case he produce

(*i*) See *Doe v. Brydges*, 7 Scott, N. R. 339.

(*k*) *Berry v. Young*, 2 Esp. Ca. 640, n. 449.

(*l*) *Per* Lord Eldon, *Ex parte Stuart*, 2 Rose, 215.

(*m*) Vide *infra*, pl. 15.

(*n*) *Barclay v. Raine*, 1 Sim. & Stu.

(*o*) Posth. 113.

the original covenant to produce the deeds, when it should be required to defend the purchaser's title.

15. It is not unusual to insert a proviso in a deed of covenant to produce title-deeds for determining the covenant, in case the vendor sell the part of the estate retained by him, and procure the person to whom the estate is sold, and the title-deeds are delivered, to enter into a similar covenant with the first purchaser for production of the title-deeds. But a seller could not, it is apprehended, insist upon such a qualification; if he could, it might on the same ground be carried on *toties quoties*, and the purchaser and those who claimed under him be put to great inconvenience; *neither could a purchaser insist upon it against the will of the seller: indeed, that would be absurd, as it is to provide for the release of the seller if he procure another to covenant. Where such a proviso is inserted, of course it stipulates that the expense of the new deed shall be borne by the seller (p).

16. The covenant in late times has commonly been framed so as to authorize the purchaser to *take* copies or extracts from them, instead of only giving him a right to have them furnished by the seller; and it is by no means clear that the purchaser may not insist upon it in that form. The covenant in that form might lead to inconvenience, and it is therefore better not to require it, but to limit the price to be paid for the copies, which should be the mere cost, for the seller is not to make a profit by the covenant.

17. A purchaser cannot, merely because an instrument is stated in the abstract of title, require a covenant to produce it. He is entitled to a covenant for the production of all the documents contained in the *abstract which are necessary to make out a good sixty years' title, with the exceptions before referred to (q).

18. We have elsewhere considered whether a covenant to produce deeds can be enforced under a covenant for further assurance (r).

19. Where it is intended that the purchaser shall have the legal right to the production of the deeds, he should have a regular deed of covenant for their production, entered into by the person in whose custody they are, clothed with the legal right.

20. We shall elsewhere have occasion to consider the general law as to covenants running with the land (s); but here we may conveniently inquire whether a covenant by a seller to produce

(p) See ch. 13, s. 3, *post*.

(q) *Cooper v. Emery*, 1 Phill. 388.

(r) *Infra*, ch. 11: *supra*, p. 467.

(s) Ch. 14, s. 1, *post*.

the title-deeds in the usual way runs with the land: that it does so with the purchased lands admits of no doubt; the question only is, whether it binds the alienee of the lands reserved by the seller to produce the deeds.

21. The real property commissioners observe (*t*), that in a recent case (*u*), where the vendor had not the custody of the original deeds, but had a covenant for the production of them, it was decided that the title was not marketable, because the covenant did not run with the land. They add, that it had previously been supposed, either that an original independent equity existed, entitling any party interested in a deed to call for its production *by any other person having the custody of it; or, at least, that such an equity existed wherever the parties requiring the production claimed under a person who had taken the precaution to procure a covenant for that purpose; and the person having the actual custody of it derived that custody from or through a person who had entered into such a covenant. In practice it was not considered that a court of equity would regard the subtle distinctions which prevail in courts of law, between covenants which do and those which do not run with the land, and they point out the evil consequences of this decision.

22. The rule in equity, it is apprehended, never was so universal as it is quoted in the first part of the above statement (*x*); but the second branch, stating what *at least* the doctrine was, appears to be correct, and it is apprehended that it is not shaken by the decision in *Barclay v. Raine*, and therefore that a covenant by a seller holding the title-deeds, of a part of his estate, with the purchaser of that part, even where it does not run with the land, will, in equity, give to the purchaser a right to enforce the production of the deeds against persons claiming and holding them through the seller. This doctrine is fully discussed in another place (*y*).

23. The case of *Barclay v. Raine*, which was decided by Sir John Leach, who also decided the case of *Fain v. Ayers* (*z*), introduced no new rule as to either the law or equity upon this subject. In that case *A* sold part of his estate to Thring, and delivered the title-deeds to him, and took from him a covenant to produce them; he then sold the residue of the estate to Barclay, to whom he gave an attested copy of the covenant to produce, but not any covenant

(*t*) Third Report, 56.

(*u*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*x*) But see *supra*, s. 5, pl. 3.

(*y*) *Infra*, ch. 14.

(*z*) *Infra*.

to produce the deed itself. The deed of covenant was lost, and the attested copy was partly illegible, and in a very mutilated state. Barclay's sons sold to Raine, and they clearly could not make a title, because there was no covenant to produce; the deed was lost, and there was no sufficient evidence of its contents. The Barclays, in order to obviate the objection, applied to Thring, who had sold his property, but was mortgagee of it, and in possession of the deeds; and although the person claiming under the purchaser from him, refused to give a general covenant to produce the deeds, yet he executed a deed by which he covenanted to produce the deeds whilst he should continue mortgagee; and he executed another deed, by which he acknowledged the execution of the original deed of covenant, and that the title-deeds were at that *time in his possession. The Vice-Chancellor dismissed a bill filed by Barclay's sons for a specific performance, with costs. He said, that a court of equity never compels a purchaser to take without the title-deeds, unless he has a covenant to produce them, and a right in equity to compel the production of the deeds, even if it existed, would be no answer. *But the equity of the purchaser in the present case would be highly questionable. Thring's covenant to produce did not run with the land*, nor was it pretended that the purchaser from him had notice of that covenant, and he, like every other proprietor, had a material interest against the exposure of his title-deeds.

24. Now, first as to the equity of the purchaser, the same learned judge in the case of *Fain v. Ayers (a)*, decided that the purchaser would have had a clear equity to compel the production of the deeds. In that case, which was subsequent to the case of *Barclay v. Raine*, he expressed a strong inclination of opinion, upon which he acted, in overruling a demurrer, that the purchaser of a part of a large estate, who never had a covenant to produce the title-deeds, had a right, upon his reselling, to compel the first seller to produce them, to show a marketable title, as the first seller's title-deeds were the root of the first purchaser's title, and in that sense a sort of common property; and he stated that he was informed that the Lord Chancellor (Eldon) had expressed an opinion to that effect (b), and we shall see that in another important case, neither he nor Lord Eldon considered it material to the binding nature of a covenant in equity, that it should run with the land at law (c). It cannot be

(a) 2 Sim. & Stu. 533; and see ch. 11, *infra*.

(b) Vide *supra*, pl. 22.

(c) *Infra*, ch. 11.

contended that a purchaser buying only a portion of the estates held under the modern deeds, can say he is not bound by a covenant entered into by the seller upon a previous sale to another, to produce the deeds, because he had not notice of it; the contents of the deeds afford notice that they relate as well to other property as to his, and the course of practice leads to the inference that if the seller has parted with a portion of the estate and still has the deeds, he has covenanted to produce them, and the second purchaser is bound to inquire.

25. As to the law, no doubt the expression in the report is, that Thring's covenant to produce did not run with the land; but it appears that Sir John Leach afterwards denied having used the expression there imputed to him. He did not say that Thring's *first* covenant did not run with the land, for he thought that it clearly did, but that the second covenant was restricted to the period of his being mortgagee (*d*); of course this must mean that it ran with the lands sold to Thring, for it was not disputed that it did so with the other lands in the hands of the original seller and those claiming under him. In that respect it was the common case, for the Barclays claimed through their father, from *A* the original seller, with whom Thring entered into the covenant. But the observation is not very distinct, for *both* of Thring's covenants ran with the land, and the real objection was, that the first was lost and the second was limited to the period of his being mortgagee. The explanation, however, relieves the doctrine from the supposed authority of the case itself.

26. Indeed, the title, it may be thought, ought to have been deemed a good one, for if a man sell part of his estate and deliver the deeds to the purchaser, and take from him a proper covenant for their production, the case upon a sale of another part by him, is just the same as a sale by a purchaser with a covenant to produce the deeds, and no doubt in each case he can make a title. But the deed of covenant itself had not been delivered over to the second purchaser (Barclay), nor had he a covenant to produce it, and the copy was mutilated; this would have been an objection, if the deed had been in existence, because the last purchaser was entitled to the custody of it, or to a covenant to produce it from the person holding it, but he was not entitled to have a covenant entered into with himself to produce the title-deeds; if such were the law, few titles would be good. But as the deed was lost, and there was sufficient

evidence of its having existed to support Thring's acknowledgment, and as he had the legal fee vested in him with the custody of the deeds, although only as mortgagee, his deed would bind the mortgagors at law when he reconveyed to them, and the equity, as we have already seen, was clear, so that perhaps, upon the whole, there should have been a decree for a specific performance, instead of the bill being dismissed with costs. It would seem also, that there was sufficient equity to have compelled the persons claiming the deeds under Thring (the mortgagor) to enter into a new covenant to produce the deeds to supply the place of the one that was lost. It was distinguishable from the case before referred to, where no covenant to produce deeds had ever been executed.

27. But still the question remains, whether a covenant to produce deeds, where the covenantor retains a part of the estate comprised in them, runs with that portion in the hands of himself and those claiming under him. For the general principles and authorities bearing upon this question, we must refer to the general discussion in a subsequent chapter (e); but I may here also observe, that the title-deeds, as things which go with the land,—descend with it, pass with it by conveyance without being named,—may properly be deemed so connected with the land itself, as to make a covenant by the owner of the land retaining the deeds bind the alienee of those lands. This is warranted by principle, and is denied by no authority. It cannot be considered as a covenant entered into by a stranger, because the connexion of the two estates under a common title, relieves the case from that difficulty. The title-deeds comprise both the estates, and the proprietors of them have a common interest in the deeds: the possession of the deeds can hardly be a joint one, and therefore they are delivered to one, subject to a liability to be produced to the other. They will descend and go over with the lands with which they are thus held as an incident to them, and the subsequent acquirers of the lands will take the deeds by force of the law operating on the contract by which they are to retain them. But taking them with the lands by that contract, they must hold them subject to the burthen imposed by that contract. Why then should not the covenant run with the lands in their hands? The deeds, the subject of the covenant, go with those lands as a benefit, and why should not the covenant run with them as a burthen? The covenant would not run with the lands in the hands of the person to whom the

deeds are to be produced were it not for the quality of the deeds, a part as it were of the inheritance. They pass as things attendant upon the inheritance, and in truth they are the sinews of the inheritance (*f*); they are not chattels, but an inheritance as the land is, and of the nature of the land, and go to the heir (*g*) as incident to it (*h*), and the owner may make the deeds appendant to a manor (*i*). Without this quality, the covenant would be one merely in gross. If then this quality makes the covenant by law run with the land, whose possessor is to have only the production of the deeds, and not the custody of them, surely the actual possession of the deeds ought to impress the covenant, as against the covenantor and those claiming under him the lands retained, with the character of a real covenant, so that it may run with those *lands. The deeds are a vital portion of the inheritance, which the owner may bind by a covenant, and therefore it would seem to be the better opinion that the covenant in question runs with the land in both directions, so as to bind at law the holders of the one estate, and to benefit at law the holders of the other.

28. It must not be supposed, from what fell from the Court in *Barclay v. Raine*, that a title would not be marketable without a covenant running with the land to produce all the deeds. Thousands of titles, although very good ones, have no such attendant covenant, and although, in strictness, objections might be taken to the operation of old covenants for production of deeds, yet if the deeds are in the proper custody, and are, in performance of the covenant, actually produced to the purchaser to enable him to examine the abstract with them, the Court would not lightly hold him at liberty to rescind the contract.

(*f*) *Lifford's case*, 11 Rep. 50, b.
(*g*) 1 Bro. Abr. 138, b. pl. 53.

(*h*) *Strode v. Blackburn*, 3 Ves. jun. 225.

(*i*) 1 Bro. Abr. *ubi sup.*

*CHAPTER X.

OF THE TITLE WHICH A PURCHASER MAY REQUIRE.

SECTION I.

OF THE ROOT OF THE TITLE.

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|---|---|
| 1. <i>Sixty years : old rule.</i> | 24. <i>Or he agree to waive it.</i> |
| 2. <i>Where earlier title could be required.</i> | 25. <i>Clear agreement required.</i> |
| 6. <i>New statute of limitations : same rule.</i> | 26. <i>And he may show the title is bad aliunde.</i> |
| 7. <i>Lay tithes.</i> | 27. <i>Bishop's title not required.</i> |
| 9. <i>Modus.</i> | 28. <i>Root of lessor's title.</i> |
| 10. <i>Advowson.</i> | 30. <i>Renewable leaseholds.</i> |
| 11. <i>Lessor's title.</i> | 31. <i>Root of that title.</i> |
| 12. <i>Whether lessee can require it.</i> | 32. <i>Lessor's consent to be obtained by seller.</i> |
| 14. <i>A purchaser can, in equity.</i> | 33. <i>Equitable title.</i> |
| 21. <i>And also at law.</i> | 34. <i>Assignees to produce title like other sellers.</i> |
| 23. <i>Unless he knew it could not be produced.</i> | |

1. A PURCHASER before the late Act of 3 & 4 W. 4, c. 27, had a right to require a title commencing at least sixty years previously to the time of his purchase ; because the old statute of limitations (a) (I) could not in a shorter period confer a title. In *Paine v. Meller* (b), Lord Eldon was of opinion, that an abstract not going farther back than forty-three years, was a serious objection to the title.

2. Even sixty years were not sometimes sufficient. For instance, if it might reasonably be presumed from the contents of the abstract, that estates-tail were subsisting, the purchaser might de-

(a) 32 Hen. 8, c. 2 ; 21 Jac. 1, c. 16. (b) 6 Ves. jun. 349. See *Robinson v. Elliott*, 1 Russ. 599.
Vide post ; and see *Barnwell v. Harris*, 1 Taunt. 430.

(I) The Courts however were so anxious to protect a long possession, that no plaintiff was entitled to so little favor as a plaintiff in a writ of right. See *Charlwood v. Morgan*, Baylis v. Manning, 1 New Rep. 61. 253 ; *Maidment v. Jukes*, 2 New Rep. 429.

mand the production of the prior title. The statutes of limitation *could not in such case be relied on; remainder-men having had distinct and successive rights, upon which at least the statute of James could only begin to operate as they fell into possession. And the like demand may still be made, regard being had to the new time of limitation (1).

3. So, if an abstract begin with a conveyance by a person who is stated to be heir at law of any person, the purchaser may call for proof of the ancestor's intestacy, and if the seller is in possession of it he will be bound to produce it; but if he have no such evidence, and there is nothing on the face of the title to draw into doubt the fact, of course the purchaser must be content with the statement in the conveyance, which depends upon the intestacy; being grounded upon the title of the heir at law in that character. In truth, the object of the inquiry is to ascertain whether to the seller's knowledge there was a will.

4. And in every case where the statement in the abstract, or its silence, leads to a fair inference that the prior title may disclose an existing defect, the purchaser may require it to be produced, although where it is not in the seller's power he cannot object to the title upon mere suspicion.

5. Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainders over, if any, were effectually barred (1). But if the deed is lost, and possession has gone with the estates created by the recovery, for a considerable length of time, and the presumption is in favor of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear (c).

6. The law as to adverse claims is altogether altered by the 3 & 4 Will. 4, c. 27 (d) (2). Fines are abolished, and a short bar, as

(c) *Coussmaker v. Sewell*, Ch. 4th & Russ. 26. May 1791, MS.; Appendix, No. 11; (d) See *post*, ch. 11, s. 4, for a view of and see *Nouaille v. Greenwood*, Turn. the Act.

(1) This made it advisable in deeds to make a tenant to the *præcipe*, or to lead the uses of fines, to recite so much of the instrument under which the tenant in tail claims, as would manifest his power of barring the estate tail and remainders over. The same observation applies to statute-deeds.

(1) See *Seymour v. De Lancey*, Hopkins, 436; *Brown v. Witter*, 10 Ohio, 142.
(2) See 2 Cruise Dig. by Mr. Greenleaf, Tit. 31, Prescription, Ch. 2, and notes.

formerly, cannot now be made. The act limits the general time to recover to twenty years, with a saving of ten years for persons under disability, but not to exceed in any case forty years, although the ten years are not expired. It allows no further time for successive disabilities, and makes the bar of the tenant in tail extend *to all whom he might have barred. But it has been decided that the rule as to the root of the title is not altered, and that a purchaser is still entitled to a sixty years' title (*e*).

7. With respect to a title to tithes as an existing lay property, the foundation of it must be a grant from the Crown after the dissolution of the monasteries, but it is not necessary to deduce the title from that period; the title following the grant may commence at the same period as the title to the estate out of which they issue would have done (*f*). Two late acts have facilitated the extinguishment of lay tithes, by enabling even a tenant for life to merge them, which before could not be accomplished, although the fee of both the estate and tithes was vested in the same person (*g*): in course of time this will make the title to the estate the title to the tithes also; but still it will be necessary to resort to the grant from the Crown: at present, however, though the tithes should be extinguished under the acts, the early title to them must be produced.

8. The title to an estate tithe free, independently of the above acts, depends as a matter of fact upon rules which are accurately laid down in our text-books on that subject.

9. Where there is a modus, much of the former difficulty has been removed by the provisions of the 2 & 3 Will. 4, c. 71, to which we shall have occasion fully to refer (*h*).

10. The old statutes of limitation did not apply to advowsons; but the new act provides, that one hundred years shall be the longest time allowed for a claim (*i*). An abstract of title therefore to an advowson should not be for a less period, and it should be accompanied with a list of the presentations, so as to show that the enjoyment has gone along with the title.

11. It was once a great question, whether a purchaser of a leasehold estate could insist upon the production of the lessor's

(*e*) *Cooper v. Emery*, 1 Phil. 388^b; in the argument *contra* in the last edition of this book.

(*f*) See *Pickering v. Lord Shelburne*. 1 *Crawf. & Dix*. 254.

(*g*) *Supra*, p. 367.

(*h*) *Post*, ch. 11, s. 5.

(*i*) 3 & 4 Will. 4, c. 27, s. 30, 31, 32, 33; *post*, ch. 11, s. 5.

title. The general practice of the Profession was, to call for an abstract of the title, but a lessee was not often able to comply with the demand. At the time the lease is granted, the title is rarely investigated, or even thought of; and a lessor cannot be advised voluntarily to submit his title to the examination of strangers. As Lord Eldon remarked (*k*), the Newcastle case is a *good a lesson upon this subject of production. The corporation produced their charters to satisfy curiosity; some persons got hold of them, and the consequence was, the corporation lost 7,000*l.* a year. The numerous cases in the books where lessees, and persons claiming under them, have been evicted on account of defects in the titles of their lessors, strongly evince the danger of taking a lease without investigating the landlord's title. No title can be depended upon, however long the estate may have been in the same family. There may be a defect in a settlement, or the person in possession may have a partial estate only, with a power of leasing. All the leases of the Pulteney estate were set aside on account of a power of leasing not having been duly pursued: nor is this the only estate of which the leases have been vacated. Besides, without an abstract of the title, a purchaser cannot even ascertain that the lessor had not mortgaged the estate previously to granting the lease, in which case (as against the mortgagee) the lessee, and consequently any purchaser from him, would be a mere tenant at will (*l*); and his only remedy would be either to redeem the mortgage, or to bring an action on the lessor's covenant for quiet enjoyment.

12. A lessee is a purchaser *pro tanto*, and it should therefore seem that *he* is not only entitled to call upon the lessor for an inspection of his title, but would not meet with any favor if he neglected to do so; for no one's misfortune is so much slighted by the courts as his, who buys a thing in the realty, and does not look into the title (*m*). In *Keech v. Hall* (*n*), Lord Mansfield appears to have taken it for granted, that a lessee has a right to examine the title-deeds; and in the late case of *Purvis v. Rayer*, the Chief Baron expressed the same opinion (*o*). The case of *Gwillim v. Stone* (*p*) seems to lean the other way, although there the decision in effect only was, that a man entering under an agreement for a lease, before the lease is granted, cannot call upon the other party

(*k*) 8 Ves. jun. 141.

(*l*) *Keech v. Hall*, Dougl. 21.

(*m*) See *Roswel v. Vaughan*, Cro. Jac. 196; and *Lysney v. Selby*, 2 Lord Raym. 1118.

(*n*) Dougl. 21; and see *Waring v. Mackreth*, Forr. Ex. Rep. 129; 11 Ves. jun. 343.

(*o*) *Infra*.

(*p*) 3 Taunt. 433.

to reimburse him his expenditure in case a title cannot be made: although certainly Mr. Justice Lawrence seems to have thought, that the mere agreement to grant the lease did not warrant an implied agreement to make a good title, or to deliver an abstract.

13. In a later case at *nisi prius* (q), Gibbs, C. J. thought that the defendant was not bound to deliver an abstract under a bare *agreement to grant a lease for twenty-one years; and Mr. Justice Heath, after instancing the case of leases for three lives, granted some years since in Devonshire, by a Duchess of Bolton, who was mere tenant for life, but assumed to have a power of leasing, and received fines to the amount of 29,000*l.*, observed, that nevertheless it had never yet been heard of, that a tenant for life was asked to show his title to lease. The instance quoted shows the strong necessity of the title being produced; and there is no instance in which a man acting under good advice, accepts a title from a tenant for life, without the production of the settlement under which he claims. However, in this case, the Court considered that the cause originated in a dispute between the two attorneys, and the Judges expressed their desire not to decide the point, without affording an opportunity for a review of their judgment. But in the later case of *Roper v. Coombes* (r), where the agreement was to grant a lease for a large premium, the contract was considered to be for the *sale* of a lease, and as the intended lessor had no right to grant it, the other party was allowed to recover back his deposit.

14. In a case where, in an agreement for a lease, there was no stipulation about title, and the lessee entered and commenced building operations, and then discovering a want of title to a part of the ground, required an abstract of the title, which was not furnished, but the lessor (I) filed a bill, praying a specific performance, or that the agreement might be annulled,—there was a reference to the Master to inquire whether the lessor could make a good title to the premises, and if he could not to the whole, whether the deficient part was essential to the enjoyment of the premises, and the Master reported that he could not make a good title to any part of the premises;—the Master of the Rolls dismissed the bill, and directed the lessor to deliver up his part of the agreement

(q) *Temple v. Brown*, 6 Taunt. 60.

(r) 6 Barn. & Cress. 534.

(I) The form and substance of the decree as stated in 3 Taunt. 436, show that it was the lessor who filed the bill.

to be cancelled, but refused to make any compensation to the lessee for the expenses he had incurred, giving him liberty to bring an action at law (s).

15. In the last equity case on this subject, where the agreement was made to take a lease for twenty-one years at rack-rent, the Master of the Rolls decided, that the intended lessor, **who was plaintiff*, could not enforce a specific performance, without producing the original lessor's title (t). But it still remains undecided, whether a *lessee* can, as plaintiff, call for the original lessor's title.

16. The argument originally urged against a *purchaser's* right to call for the lessor's title was, that a lessee was seldom able to produce the title; and, therefore, on the ground of convenience, a purchaser must be presumed to know this circumstance, and to buy, subject to an implied condition, not to call for the freehold title. But to this it was answered, that the lessor's title was generally required; and where the vendor could not produce the title, it was usual to state the fact in the particular or agreement. Therefore, where that statement was omitted, it was fair to presume that the vendor was in possession of the title. There could be no inconvenience in establishing the purchaser's right to call for the freehold title; for the vendor had it in his power to prevent the claim by an express stipulation.

17. Although the question came before Lord Eldon more than once, he avoided deciding the abstract point, but appeared to think that the better rule would be, that the purchaser was, in the absence of an express stipulation to the contrary, entitled to the production of the lessor's title.

18. Lord Eldon decided thus far, that the vendor cannot demand a specific performance if the purchaser can show that the title to the freehold is not good, or that there are any incumbrances on it; and that equity will not afford its aid against the purchaser, where the nature of the leasehold title is misrepresented. The facts in the case were these: the interest was described as fifty years, the residue of a term free from incumbrances, whereas it appeared that there were only sixteen years to come of the old lease, granted by Sir Richard Grosvenor in 1722, and the residue of the fifty years was granted by the trustees of Lord Grosvenor in 1791, as a reversionary term for thirty-four years. It appeared that, in

(s) *Stone v. Gwillim*, see 3 Taunt. (t) *Fildes v. Hooker*, 2 Mer. 424; Lord 436; *Gwillim v. Stone*, *supra*, p. 488. *Ossulston v. Devereux*, 26 May 1818. MS. 255.

1785, the estate in question was charged with jointures, mortgages, &c. Lord Eldon held, that in these cases a purchaser should at least know accurately what he is buying; that in the case before him, the title produced did not correspond with that contracted for; and that there was a wide difference between the residue of a lease that has existed for a century with possession under it, and a small residue of an old term, and a reversionary lease granted by persons whose title from the first lessor is not *deduced. He also thought that he was bound to look at the incumbrances, and therefore dismissed the bill, but without costs (*u*).

19. But when it is stated that the property is held under two leases at one rent for a stated term, it must be understood that the leases are consecutive ones (*x*).

20. The general point was decided in equity in favor of the purchaser's right in the case of *Purvis v. Rayer* (*y*) in the Exchequer. Ravenshaw (as the agent of Purvis) agreed to sell, and Rayer agreed to purchase a house in Bath, held for the remainder of a term of years under the corporation of Bath and the late Richard Atwood, at the sum of 1,500 *l.*; an abstract to be made and delivered by Purvis. The bill was filed by the seller, and the title was referred to the Master, who reported that the plaintiff could not make a good title to the said leasehold premises. The report was grounded on the non-production of the lessor's title. The plaintiff excepted to the report. The Chief Baron overruled the exception. He observed that the question was, whether, when a man sells a leasehold estate, he could compel the purchaser to take it without showing him his title. *White v. Foljambe* was the first case on this point. There was no case that went the length of showing that a lessor is not bound to show his title. This was a lease from a corporation; and the general rule is, that where a vendor offers anything for sale, the vendee is entitled to have the thing he buys with a moral certainty that he has the thing he buys. If a man sell an inheritance, he must show a title to the inheritance: so if a life estate. Then what is the difference where a lease is sold?

(*u*) *White v. Foljambe*, 11 Ves. jun. 337; *Deverell v. Lord Bolton*, 18 Ves. 505; and see *Radcliffe v. Warrington*, 12 Ves. jun. 326; *Lady Saltoun v. Phillips*, sittings after T. T. 1813, *cor.* Lord Ellenborough, where a purchaser recovered his deposit, because the seller claimed his lease subject to Lord Grosvenor's incumbrances, and had stated

that the lease was only subject to the ground-rent, although he had not undertaken to produce the landlord's title. See 9 Price, 515.

(*x*) *Spratt v. Jeffery*, 10 Barn. & Cress. 249.

(*y*) 28 July 1821, MS.; S. C. 9 Price, 488.

It is said, however, that this is an anomalous case ; but the law has not said so, nor has it been so considered in any of the decided cases. Then it is objected, that a lessee has not the means of compelling the inspection of his lessor's title : that is true, but furnishes no ground for an exception. A lessee may insist on looking into his lessor's title, or that he should produce it ; but if he omits to do so, is that any reason why the vendee of a lease should be deprived of those advantages ? Another course 'is, to state in the advertisement that you cannot show the title. Therefore, though after the lease is granted the lessee cannot compel the production *of his lessor's title, there is no reason why the vendee should be put to any risk. Then is there a good title here ; the lease is made in 1774 ; does the length of time make the lease good ? Suppose it had been made by a tenant for life ; a tenant for life might live for forty-five years ; forty-five years' possession would not be good evidence of a title to the inheritance ; but then it is said, this was a lease by a corporation. The Chief Baron was of opinion that there might be circumstances which might make an alteration ; but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation, but on the death of the tenant for life, the estate would cease. This case, therefore, did not differ from the case of a lease from an individual.

21. Lord Tenterden at *nisi prius* held that where the agreement was silent, a party selling a lease was not bound to produce the lessor's title. He treated the equity cases as not deciding the legal point (z). But the point has since been decided otherwise in a court of law (a), and the seller was nonsuited because he had not produced the lessor's title. The term was a very short one, and 30*l.* was to be paid for the fixtures, and no other consideration. The Court of B. R. thought that the decisions, especially that of *Purvis v. Rayer*, were authorities upon the general question, whether it arose in a court of law or equity, and that the true ground of refusing relief by a specific performance in these cases was, that the vendor *by his contract* was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise. If that is his *contract* he must

(z) *George v. Pritchard*, 1 Mood. & Ry. 417.

(a) *Souter v. Drake*, 5 Barn. & Adol. 992 ; *Nap v. Betty*, 4 Man. & Gra. 410 ; 5 Scott, N. R. 508.

equally fail in a court of law, unless he can prove the performance of it on his part. And no reason occurred to the Court why, as the courts of law and equity would put the same construction on a contract for the sale of a freehold estate, they should do otherwise in respect of a contract for the sale of a leasehold ; unless therefore there be a stipulation to the contrary, there is in every contract for the sale of a lease an implied undertaking to make out the lessor's title to demise as well as that of the vendor to the lease itself, which implied undertaking is available at law as well as in equity.

22. It is therefore now firmly settled, both at law and in equity, that a seller of a leasehold cannot make a good title unless he can produce the lessor's title.

*23. If a purchaser of a leasehold estate had notice, at the time he entered into the contract for purchase, of the vendor's inability to produce the lessor's title, he would not afterwards be allowed to insist on its production. Wherever, therefore, a vendor of a leasehold estate has not an abstract of the lessor's title, this circumstance should be mentioned in the particulars of sale, if sold by auction ; or in the agreement, if sold by private contract. And of course if a vendor of a leasehold estate be unable to procure the lessor's title, equity cannot assist the purchaser unless he will dispense with the production of the title to the freehold.

24. And if the purchaser agree to accept a proper assignment, without requiring the lessor's title, he will at law be compelled to pay the price, although the lessor's title prove to be bad (b).

25. But although there is but a short period of the lease unexpired, and the value of the property is small, and no premium is given for the lease, and a sum is to be paid for the fixtures as per list, which circumstances make it probable that the contracting parties never thought of the title, yet that cannot be stated higher than a very probable conjecture, and it would be dangerous to defeat the general rule by speculation on the possible intention of the parties (c).

26. And where the seller is absolved from the obligation to produce the lessor's title, yet the purchaser is not bound by the contract even at law, if he can show *aliunde* that the title is not a

(b) *Spratt v. Jeffery*, 10 Barn. & Cress. 249 ; as to the effect of the stipulation in that case, see *Shepherd v. Keatley*, 1

Cro. Mees. & Rose, 117, and *supra*, p. 391 ; and see 1 Per. & Dav. 383.

(c) *Souter v. Drake*, 5 Barn. & Adol. 992.

good one (*d*) ; or if it appears defective on the face of the abstract (*e*).

27. A purchaser of a lease held under a bishop's lease, cannot call for the lessor's title (*f*).

28. In regard to the root of a title to a leasehold, where the freehold is to be produced ; unless there were reason to suppose that the lessor was only tenant for life, of course an earlier title could not be required than if the freehold itself were sold, nor in most cases could so early a title be called for. In *Purvis v. Rayer*, we have seen (*g*), that the Chief Baron considered, that the circumstance that forty-seven years had elapsed since the term was granted, did not make the title good. Suppose, he asked, it had been made by a tenant for life,—a tenant for life might live for *forty-five years,—forty-five years would not be a good evidence of a title to the inheritance, but then it is said this was a lease by a corporation. There might be circumstances which might make an alteration [that is, make such a title good], but here there was no act of ownership prior to 1774, no prior leases. A tenant for life might have conveyed in fee to a corporation, but on the death of the tenant for life the estate would cease. †

29. A leasehold title, commencing forty-seven years ago, would, however, in most cases, be deemed satisfactory, and in every case would readily admit of slight evidence in support of it. For example, in *Purvis v. Rayer*, evidence that the corporation had held the estate for some years previously to the lease of 1774, or had granted a lease prior to that, which would have proved their seisin, would have been satisfactory. And where the freehold is vested in individuals, a succession of landlords who had received rent, would tend to support the title ; or if the same lessor had remained for a long period, it could rarely be difficult to show whether or not he was owner of the fee. It is not in cases of old leases that much difficulty occurs, for there is little objection to a landlord in 1838 showing that his predecessor in 1790 was seised in fee, which is all that would be required ; but in the instances of modern leases, where the lessor does not choose, after he has granted a lease, to produce his present title to a purchaser of the lease, who is perhaps waiting for an opportunity to raise an objection to the freehold title, in order to get rid of his purchase.

(*d*) *Shepherd v. Keatley*, 1 Cro. Mees. 722.
& *Rose*. 117.

(*e*) *Sellick v. Trevor*, 11 Mees. & Wels.

(*f*) *Fane v. Spencer*, 2 Mer. 430.

(*g*) *Supra*, p. 491.

30. With respect to the title to renewable leaseholds, great difficulty constantly occurs. All public bodies who grant renewable leases, require the old lease to be given up before they will grant a new one; and when they once obtain possession of a surrendered lease, they will not part with it, and sometimes refuse to furnish a copy of it. When the lessee sells, he produces an abstract of the subsisting lease and subsequent instruments. Now this is a title which it is impossible to accept, however willing the purchaser may be, and although he may have waived calling for the lessor's title. Every lease is stated to be granted in consideration of the surrender of the former lease, and by means of this reference the chain of title is kept up. The reference in the last lease to the one immediately preceding, is notice of it to the purchaser, and that again is notice of the one before that, and so by steps to the first lease. And if in any of these leases the lessee is described as devisee under a will, or there is anything to lead the mind to a conclusion that the lessee is not absolutely entitled, the purchaser will be liable to the same equity as the lessee was subject to, although he had no other knowledge of the fact, than the mention *in the lease of the surrender of the former lease, equity deeming that sufficient to lead him to inquire into the title (*h*). Harsh as this rule may seem, it is quite consistent with the general principles of equity, and is called for in this case, because public bodies generally renew with the person having the legal estate, and seldom suffer any trusts to appear on the lease, lest they should be implicated in the execution of them.

31. The root of the title in such cases is carried back to a considerable period where the estate has been the subject of settlements. Attested copies of the surrendered leases can in general be obtained, and of course the settlements and other family deeds, which are the title-deeds to such an estate, are, as in other cases, either in the possession or power of the seller. The root of the title must depend upon the transactions in which the leases have been included. Where there have been repeated sales, a short period would be sufficient, but where the estate has remained in the same family, and the renewals have been included in settlements, it may be necessary to produce just as ancient a title as if the freehold were sold (*i*).

32. Although a purchaser of a lease buys with full notice that

(*h*) *Coppin v. Fernyhough*, 2 Bro. C. C. 291.

(*i*) See 3 & 4 Will. 4, c. 27, s. 24, 25, 26, 27, *post*, ch. 11.

a title cannot be made without the consent of the lessor, yet it lies on the seller and not on the purchaser to obtain the consent. It cannot be inferred that the seller only agreed to part with his interest in the estate as far as he was able to do so (*j*).

33. It is seldom that a purchaser undertakes to accept an equitable estate, and where he does not it is indifferent to him whether the seller has the legal or equitable estate, for under a common contract he will be entitled to the legal estate. It is possible that a seller may have a title which by lapse of time cannot be disturbed in equity (*k*), and yet he may not be able to make a good title; for although between two equities one person may have acquired, by length of possession, the right against another, yet a legal right may remain unbarred. But if even a party sold, stipulating that the purchaser should not call for the legal estate, that would make no difference as to the root of the title, for it would be necessary to show, as in common cases, the beneficial or equitable title to the estate, and to show besides, that the legal estate, although outstanding, could not be used adversely to the purchaser.

*34. In the case of *Pope v. Simpson* (*l*), Lord Rosslyn appears to have held, that persons purchasing from the assignees of a bankrupt have no right to expect more, than that the assignees should deliver over such title as the bankrupt had. This decision, however, was opposed by prior cases (*m*), and the general rules of equity; and in a late case Lord Eldon expressly denied the doctrine advanced by Lord Rosslyn (*n*); and Sir William Grant actually decided, that assignees stand in the situation of ordinary vendors (*o*) (*1*).

(*j*) *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 2 Marsh. 332; 7 Taunt. 9.

(*k*) *Cholmondeley v. Clinton*, Turn. & Russ. 107; and see 3 & 4 Will. 4, c. 27, *infra*, ch. 11.

(*l*) 5 Ves. jun. 145.

(*m*) *Spurrier v. Hancock*, 4 Ves. jun. 667; and see *Orlebar v. Fletcher*, 1. P. Wms. 737.

(*n*) *White v. Foljambe*, 11 Ves. jun. 337; and see 18 Ves. jun. 512.

(*o*) *M'Donald v. Hanson*, 12 Ves. jun. 277.

(1) See *Cooper v. Denne*, 1 Vesey, jr. (Sumner's ed.) 565, 567 note (9) of Mr. Hovenden.

SECTION II.

OF A TITLE WITH AN INDEMNITY.

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| <ol style="list-style-type: none"> 1. <i>Title subject to a charge.</i> 3. <i>Compensation and indemnity: Hor-niblow v. Shirley.</i> 4. <i>Observations upon it.</i> 5. <i>Indemnity: Halsey v. Grant.</i> 8. <i>Fee-farm rents on estate sold and others: title bad.</i> 12. <i>Purchaser not bound to take indemnity.</i> 13. <i>Apportioned rent.</i> | <ol style="list-style-type: none"> 15. <i>Sale in lots, one to be subject to all the rent.</i> 16. <i>Stipulation for a charge on one lot as an indemnity.</i> 17. <i>Nature of indemnity.</i> 18. <i>Danger of eviction not a case for indemnity.</i> 19. <i>Arbitrator: indemnity.</i> |
|---|---|

1. IN *Dickenson v. Dickenson* (a), an estate charged with legacies, some of them for infants, was sold, and the amount of the legacies was nearly equal to the purchase-money, and a decree was made for a specific performance upon payment of their legacies to the adult legatees, and the investment in Government securities of the residue of the purchase-money, to remain with all accumulations for the payment of the legacies to the infants when they should become entitled, and the Court said, if in the event the fund should turn out deficient for payment of the infants' legacies, they must still have recourse to the estate for the deficiency (1). I may however observe, that the title with such a charge could *not have been forced upon the purchaser, and that no doubt the decree was submitted to by the purchaser, who was desirous to take the estate with the risk. The report states, that he refused to take the title unless the estate was fully discharged from the legacies, but no objection appears to have been made by him to the decree upon further directions.

2. We have already seen that *small* rents may be subjects of compensation (b), although larger ones cannot; and that, as a general rule, a purchaser cannot be compelled to take subject to an indemnity (2).

(a) 3 Bro. C. C. 19.

(b) *Supra*, p. 354.

(1) See 2 Story Eq. Jur. §1132.

(2) See 2 Story Eq. Jur. §777, §778.

3. In the case of *Horniblow v. Shirley (c)*, by an agreement between the lord of some manors, and the owner of the rectorial tithes and the commoners for an enclosure, it was agreed that some of the tithes should be sold to the lord in fee, free from all incumbrances whatsoever, at a value to be fixed by the commissioners. To a bill filed for specific performance, the purchaser objected that the tithes were subject to charges from which they could not be exonerated, and which were suppressed from the referees, and that the referees much exceeded the value of the tithes from a mistake as to the quantity of the land. He, therefore, insisted that the plaintiff was not entitled to a specific performance, *unless* he would make a considerable abatement in the purchase-money, in respect of the outgoings and also for the mistake. By the Master's report, it appeared that the tithes, as part of the rectory, were subject to annual charges amounting to 11*l.* 3*s.* 4*d.*, and to the repairs of the chancel, but the purchaser was himself bound to build a new church, and to other charges amounting to 3*l.* 18*s.* 8*d.*, which had not been paid within eighty years, if ever. A specific performance was decreed by Lord Alvanley, at the Rolls, with a *compensation* for the 11*l.* 13*s.* 4*d.* a year, and an *indemnity* out of lands of considerable value against the 3*l.* 18*s.* 8*d.* and the repairs of the chancel (1).

4. It was said in another case, *arguendo*, that when the case came on for further directions it was argued, that on account of the *rent-charge* the purchaser was not obliged to take the title; but that he was compelled to take it; and Lord Alvanley said, if such an objection was to prevail, a purchaser of a portion of a

(c) 13 Ves. jun. 81.

(1) See *Gans v. Renshaw*, 2 Barr, 34. Where the vendor contracted to convey to the vendee, "by a good and valid conveyance in law," a farm, which was originally parcel of a large tract of land granted by the proprietor of a *manor*, to the ancestor of the vendor, in fee, "yielding and paying to the grantor, his heirs and assignees, the yearly rent of ten shillings;" the proportion of which *quit-rent* on the farm, was fifty-four cents a year; the existence of the quit rent being known to the vendee at the time of the contract, it was held that the existence of such an incumbrance, if it was any, was no objection to a decree of specific performance of the contract. *Ten Broeck v. Livingston*, 1 John. Ch. 357. The *quit-rent* in this case did not appear to have been demanded or paid for over sixty years.

In another case, where the vendor upon a contract for the sale of a farm, which he held under a lease from V. R. at a nominal rent of a pound of wheat, containing a reservation of mines and minerals and water privileges, and a pre-emptive right of purchase, covenanted to give to the purchaser a good and lawful deed of the premises, it was held, that the reservation of the nominal rent was no objection to the title; and there being no mines or minerals or water privileges on the premises, and V. R. having agreed to relinquish his pre-emptive right of purchase, of which the vendee had notice at the time of making his contract to purchase, a specific performance was decreed. *Winne v. Reynolds*, 6 Paige, 407.

large estate would always be at liberty to get rid of the contract (*d*). But this can hardly be an accurate account of what passed, for the purchaser's answer amounted to a submission to perform the agreement upon a compensation, which he had, and to the indemnity *it does not appear that he objected (*e*). In a case before Lord Eldon (*f*) it was said by counsel, that in *Forteblow v. Shirley*, much discussed before his Lordship, it appeared that the estate was subject to the repairs of the chancel of the parish church; the parties agreed to accept an indemnity settled by an arbitrator, but the Court refused to allow interest, holding the purchaser justified in declining to take possession while the title was in dispute. This is manifestly the same case which, according to this statement before Lord Eldon, was heard by him upon appeal, and he partially reversed the decree, for the Court below gave interest, which Lord Eldon denied. It would seem that the appeal was not upon the question of title; and it seems quite clear, that in a common case, which *Horniblow v. Shirley* was not, such charges as existed in that case would not be fit subjects for compensation and indemnity.

5. In the case of *Halsey v. Grant* (*g*), before Lord Erskine, rectorial tithes, which had been sold by the plaintiff to the defendant, were subject to a perpetual annual rent of 19*l.* 6*s.*, and to some other small payments, and, as part of the rectory, to the repairs of the chancel of the parish church. The objection also extended to some copyholds which were to be enfranchised. The Lord Chancellor observed, that *Horniblow v. Shirley* could not be considered an authority altogether compulsory. Upon the case before the Court he said there could be no ultimate difficulty. The objection might be something visionary. It was not likely that these tithes would be resorted to for the charges. The seller could not have any difficulty in quieting this objection and putting an end to the incumbrance. Some further inquiry was necessary as to the nature of the rent. The plaintiff could relieve the purchaser from all uneasiness upon this head, and if he could he ought to do so. A specific performance was decreed, with a reference to the Master to inquire whether there ought to be any, and what indemnity.

6. This is not a satisfactory way of dealing with such a case, and it leaves the decision with little weight as an authority. The charges appear to be such as equity could not compel a purchaser

(*d*) 13 Ves. jun. 75.

(*e*) See 13 Ves. jun. 79.

(*f*) 2 Swanst. 223.

(*g*) 13 Ves. jun. 73.

to take subject to, however satisfactory might be the indemnity against them.

7. In *Prendergast v. Eyre* (*h*), the Master of the Rolls in Ireland observed, that in the case of *Horniblow v. Shirley*, the annual charges appear to have been 5*l.*, 6*l.* 3*s.* 4*d.*, and 3*l.* 6*s.* 8*d.*, but when the *case is looked at with attention, it will not be easy to repose upon it as a clear authority for compensation, even in small charges affecting the property sold and conveyed. First, the question was not raised as an objection to the title, but compensation merely was claimed by the answer; secondly, it had been the case of an award by arbitration; and both these facts are adverted to by Lord Erskine in *Halsey v. Grant*. In the case of *Halsey v. Grant*, the perpetual rent was 19*l.* 6*s.* a year, and it was not a certain, but merely contingent (*i*), and, as expressed by Lord Erskine, a visionary charge; for it was also charged upon the parsonage-house and land of large annual value; secondly, whether it was any charge at all with a power of distress was doubted, and made the subject of inquiry.

8. In a late case (*i*), upon a purchase, it was agreed that if there should be found any fee-farm rents, or quit-rents, chargeable on the same, an allowance should be made at the rate of thirty years' purchase on the amount thereof. It appeared that the estate, with others of great value, was charged with a perpetual rent of forty marks, originally reserved to the crown; but a similar rent was granted to trustees in fee, in the usual way, out of a part of the estate not sold, of nearly ten times the annual value of the rent, as an indemnity to the other estates against the rent. It was objected, that this charge prevented the seller from making a good title. It was argued by the writer, on the part of the seller, that this was the precise case in which a purchaser would be compelled to take a title with an indemnity. Equity looks only to the substantial execution of the contract; and here the rent was not, *in substance*, a charge on the land. It was not like the case of a lease, where non-payment of the rent, or non-performance of the covenants, might avoid the estate of the person who was required to accept the indemnity; but this was the simple case of a money payment,

(*h*) 2 Hogan, 92, 93.

(*i*) *Hays v. Bailey*, Rolls, 10 Aug. 1813, MS. vide *infra*. See Cassamajor

v. Strode, 1 Wills. Cha. Ca. 428; *Warren v. Bateman*, 1 Fla. & Kel. 448.

*1) This is not quite accurate. The charge was a certain one, but it was not probable that resort would be had to the tithes for it.

which would, of course, be accepted from the owner of the estate exclusively charged with it, by way of indemnity; and which estate would always be liable to answer any payment made on account of the rent by the persons intended to be indemnified against it. The objection, if allowed, would affect half the titles in the kingdom. It applies to nearly all the estates which came into the hands of the Crown on the dissolution of the *monasteries. *Dickenson v. Dickenson* (*k*) was a stronger case; for there the purchaser was compelled to take the title, although the Judge was of opinion, that if, in the event, the fund should turn out deficient for payment of the infants' legacies, he must still have recourse to the estate for the deficiency. The ground of the decision must have been, that there was no chance of the fund proving deficient. *Halsey v. Grant* (*l*) is a direct authority in favor of the seller; and there the indemnity fund was not so large with reference to the amount of the charge as the present; and although *Horniblow v. Shirley* (*m*) was a case of compensation, and not of indemnity, yet it appears that Lord Alvanley said, that if such an objection was to prevail, a purchaser of a portion of a large estate would always be at liberty to get rid of a contract (*n*). In the present case, the purchaser did not object to the estate being charged with a fee-farm rent, provided he was paid its value. Here the rent is charged only in point of form; and therefore he can require no allowance. On the part of the purchaser, it was argued, that the clause relied upon, on the other side, was evidence that the purchaser was not to take the estate subject to any rent, unless it could be sold to him; and the estate would always be liable to the fee-farm rent, notwithstanding the indemnity. The Master of the Rolls was of opinion, that the clause in the agreement referred to a rent charging the estate sold only, and not to a rent charging it and other estates; and that the Master was justified in considering the rent as an objection to the title. As to the question of indemnity, his Honor observed, that *Halsey and Grant* was certainly a case of indemnity, and *Horniblow and Shirley* a case of compensation; but he doubted whether the deed executed in order to relieve the estate in question, could be considered such an indemnity as a purchaser ought to be compelled to accept, nor should he decide whether in this case any indemnity could or ought to be given by the vendor against such fee-farm rent. He should leave that to be decided when the cause came on to be heard hereafter.

(*k*) 3 Bro. C. C. 19.
 (*l*) 13 Ves. jun. 73.

(*m*) 13 Ves. jun. 81.
 (*n*) 13 Ves. jun. 75.

9. Upon an appeal to Lord Eldon, he affirmed the decision of Sir William Grant, on the ground that the rent in question did not fall within the condition; and he treated the early cases as not being authorities, and held that a seller was bound accurately to describe what he was selling (*o*); and this put an end to the suit. Sir William Grant avoided deciding any question beyond that of *title, and the cause ought to have been set down before him for further directions, instead of appealing against his order on the exception, although it appears strange for a seller to bring on his cause for further directions where his title has been pronounced to be bad on the hearing of exceptions. But in this case it was only on further directions that the Judge could properly decide upon the nature of the indemnity, if he thought it a case for an indemnity. As to the case itself, the purchaser did not object by his contract to the existence of fee-farm rents, provided he had compensation for them. If therefore the seller had been willing to sacrifice, by way of compensation, the whole value of the rent of forty marks, it would seem that the purchaser could not have objected that the rent rode over other estates also. This is the course which the seller ought to have pursued.

10. In the case of *Fildes v. Hooker* (*p*), the Vice-Chancellor, Sir John Leach, observed, that the utmost length of indemnity was, that if a good title can be made subject to an incumbrance, the purchaser shall take the title, with a security protecting him against the incumbrance. He did not know that the Court had gone so far, and he should not be disposed to follow such a rule, because the purchaser is entitled to an estate free from incumbrance. It would be difficult to convince him that such a rule was right.

11. In *Paine v. Meller* (*q*), where annuities were charged on the estate sold and other estates, and a trust of stock was declared for payment of them, the question was, whether the purchaser had not agreed to take an indemnity against them. Lord Eldon said, that he did not consider whether this objection was of form or substance, but would leave it to be determined, when it might be necessary, whether the purchaser, under such circumstances, had not a right to insist that the annuitants should release the premises; or whether the Court would say, under all circumstances, the purchaser should take the premises burthened with the annuities, with a great number of others [other estates], and seek his

(*o*) M. T. 1821, MS.

(*p*) 3d April 1818, MS.; 3 Madd. 193.

(*q*) 6 Ves. jun. 349.

indemnity against the trust property and the trustees, if they preferred a personal covenant by the trustees.

12. In the later case of *Balmanno v. Lumley* (*r*) the purchaser, upon a reference as to title, asked for a direction, in case the report should be against the title, for compensation and indemnity, as indemnity as to part might be more convenient than compensation. This was resisted by the seller, as to indemnity, insisting *that the purchaser must either take the title with an allowance for a defect or reject it. Lord Eldon said, he did not apprehend the Court could compel the purchaser to take an indemnity, or the vendor to give it, and accordingly confined the order to compensation. And in a case in the House of Lords he observed, that if in a suit for specific performance it turns out that the defendant cannot make a title to that which he has agreed to convey, the Court could not compel him to convey something less with indemnity against the risk of eviction. The purchaser is left to seek his remedy at law in damages for the breach of contract (*s*). And in a late case the Master of the Rolls laid it down, that parties may, no doubt, contract for a covenant of indemnity; but if they do not, the Court cannot compel a party to execute a conveyance and give an indemnity; and this, he said, was established by Lord Eldon in the case already referred to (*t*).

13. Where an estate is sold subject to a rent, which, although not so stated, appears to be only a part of a larger rent charged on that and other property, the purchaser will not be bound to take the title, although for many years the apportioned rent has been received: an apportionment by deed must be shown. It is the duty of the vendor to give the purchaser a complete formal discharge of all the further rent that the house was ever liable to. Although an apportionment may be presumed, yet, as Mr. Justice Chambre observed, the question here is not what may be presumed, but whether a purchaser is compellable to accept a purchase, where his title rests only on presumption, which may be rebutted by other evidence. And Chief Justice Mansfield said, that a court of equity would not decree a specific performance in a case like this, unless the seller could procure the ground-landlord to apportion the rent, by joining in an assignment of the lease: in which assignment the apportioned rent should appear (*u*).

(*r*) 1 Ves. & Bea. 224.

(*s*) 1 Bligh, 66, 67.

(*t*) *Aylett v. Ashton*, 1 Myl. & Cra. 114; see ch. 7, s. 1, 2.

(*u*) *Barnwell v. Harris*, 1 Taunt. 430. See *Bowles v. Waller*, Hay, 441; *Warren v. Bateman*, 1 Fla. & Kel. 445; *Taylor v. Martindale*, 1 You. & Col. 658.

14. But where an apportioned rent is sold, if the rent is an apportioned rent, the purchaser cannot object that he will not have the same remedies as if the rent were entire (*x*).

15. So where an estate, held under one lease, is sold in lots, and the fact is stated, and it is stipulated that the purchaser of one particular lot is to be subject to the whole of the rent, the *other purchasers cannot object to the title, although there is a clause of re-entry on non-payment of the rent contained in the lease (*y*).

16. In a case where an estate was sold in lots, and one of the conditions stated that the estate was subject to the perpetual payment of 120 *l.* to the curate of *A*, but the same and a perpetual annual payment to the hospital of *B* were in future *to be charged upon* and paid by the purchaser of lot 1, only; it was held, that the purchasers of the other lots were only entitled to such an indemnity as could be made by the purchaser of lot 1, to the purchasers of the other lots (*z*), and were not entitled to have these lots exonerated altogether from the charges, for the condition refers only to an exoneration as against the purchasers, and not an exoneration as against the owners of the annual payments. So if upon the sale of an estate which is subject to a charge, for instance, that of repairing a chancel, a stipulation is made that part of the estate shall be exonerated from it, the vendor is not bound to procure an act of parliament for exonerating it from the charge, but is merely to exonerate it by a sufficient security on another estate.

17. We may here observe, that where one estate is to be exonerated from a charge by a security on another estate, the security should be co-extensive in quantity of estate with the original charge, and the new rentcharge should be sufficient in amount to cover the old one, and the costs also, and there should be a sufficient number of trustees, and there should be no impediment in the way of the immediate relief of the purchasers if damnified, and the purchasers should have a voice in the appointment of new trustees (*a*); and of course a good title must be shown to the estate upon which an indemnity is agreed to be given (*b*).

(*) So held by the V. C. in *Bliss v. Collins*, reported in 4 Madd. 229. See S. C. 1 Jac. & Walk. 426; *Walter v. Maunde*, 1 Jac. & Walk. 181; see *Roberts v. Stoll*, 1 Mann. & Grang. 577.

(y) *Walter v. Maunde*, *ubi sup.*; *Patterson v. Long*, 6 Beav. 590.

(z) *Cassamajor v. Strode*, 1 Wils. Ch. Ca. 428.

(a) See *Cassamajor v. Strode*, 1 Wils. Ch. Ca. 428; and see *Hayes v. Bailey*, *post*.

(b) *Cottrell v. Watkins*, 1 Beav. 361.

18. In the cases hitherto considered the purchaser is in no danger of eviction, and an indemnity will secure him against loss. But where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under lessee might be evicted without any breach on his part, it was held by Sir John Leach, Vice-Chancellor, that he was not bound to accept the title with an indemnity. He observed, that where a party comes for a specific performance, he desires the Court to give the party the *specific subject. Now here he could not secure the possession of the subject upon the terms agreed upon. But he offers an *indemnity*. *The lessee might be evicted*, and therefore it was compensation and not indemnity that was offered. I will give you the subject of the contract not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the Court could not compel a performance with a compensation (c). According to the *report*, the Master of the Rolls said he could not bring himself to the opinion of the Master, that the offer of the seller to indemnify the purchaser in case of his eviction was equivalent to a secure title. Where a good title could be made subject to a pecuniary charge, a court of equity has compelled a specific performance of the contract upon security against the charge. Even that principle might have been questionable, as imposing at all events a considerable degree of trouble upon a purchaser, to which he had not subjected himself by the terms of his contract. But there the purchaser is effectually protected in the possession of the specific subject of his contract. Here the seller admits that he cannot protect the purchaser in the specific subject of his contract, and only proposes, in effect, to secure to him a pecuniary compensation for the value in case he loses that possession. A court of equity had never acted upon such a principle. A vendor could not be aided there who was not able to secure to the purchaser the specific property for which he has contracted (1).

19. Where a purchaser stipulates for a good title, and there is a reference to an arbitrator of all questions on the agreement, if a question is raised on the sufficiency of the title, the arbitrator cannot award a conveyance with an indemnity : his duty is to award whether the title is good or bad (d).

(c) *Fildes v. Hooker*, 3d April 1818, MS.; 3 Madd. 193. (d) *Ross v. Board*, 8 Add. & Ell. 100.

(1) *Blake v. Phinn*, 3 Mann. Grang. & Scott, 976. See *Thompson v. South*, 20 Pick. 138, Per Wilde J.

*SECTION III.

OF DOUBTFUL TITLES.

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| 1. <i>Title to be sifted.</i> | 12. <i>Biscoe v. Perkins.</i> |
| 2. <i>Purchaser favored.</i> | 13. <i>Biscoe v. Wilks.</i> |
| 3. <i>Doubtful title not enforced in equity :
 case directed.</i> | 14. <i>Observations upon them.</i> |
| 4, 15. <i>House of Lords adopts the rule.</i> | 16. <i>Lord Eldon regretted the rule.</i> |
| 5. <i>What is a doubtful title.</i> | 17. <i>House of Lords refused to decide upon
 exceptions.</i> |
| 6. <i>Marlow v. Smith.</i> | 18. <i>Observations upon it.</i> |
| 8. <i>Rational doubt : operation of rule.</i> | 19. <i>Judge gives weight to his own doubts
 only.</i> |
| 9. <i>Decision in D. P. not a warranty.</i> | 20. <i>Purchaser obtaining the adverse title,
 bound.</i> |
| 10. <i>Doubts upon law or fact.</i> | |
| 11. <i>Moody v. Walters.</i> | |
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1. WHERE a man makes a purchase of an estate to which the vendor represents that he has a good title, the purchaser has a right to insist that the question, whether he have or have not a good title, shall be sifted to the bottom before the vendor can be let off from his original contract. A court of equity does not sit to determine that men shall be willing purchasers whether they will or not, but to judge whether they have got a good title (*a*).

2. A court of equity called on to enforce specific performance of an agreement for the conveyance of an estate to one party, and payment of the purchase-money to the other, must feel anxiety to protect the purchaser, and give to him reasonable security for his title, not compelling him to take a title without knowing whether it is good or bad. The vendor, if his title is good, suffers only the temporary inconvenience of delay, but the vendee, if it is bad, may sustain a severe loss. The inclination of the Court, therefore, is in favor of the vendee, and a vendor claiming to be exempted from the general rule is required clearly to establish a case of exception (*b*) (1).

(*a*) *Per* Lord Eldon, 3 Mer. 137, 140; (*b*) *Per* Master of the Rolls, 3 Swanst. 168.
see ch. 8, s. 2, *supra*.

(1) See *Beckwith v. Kouns*, 6 B. Monroe, 222.

3. To enable equity therefore to enforce a specific performance against a purchaser, the title to the estate ought, like Cæsar's wife, to be free even from suspicion (*c*); for it would be an extraordinary *proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him (*d*). It hath, therefore, become a settled and invariable rule, that a purchaser shall not be compelled to accept a doubtful title (*e*) (1); neither will he be forced to take an equitable title (*f*) (2); nor will a case be directed to the Judges as to the title, unless the purchaser be willing that it should (*g*). In one case, where the opinion of the Court was in favor of the title, the purchaser's exceptions were overruled, with liberty to him, if so advised, to have a case sent to a court of law (*h*). And even if a case be directed, and the Judges certify in favor of the title, yet a specific performance would not be decreed unless the Court itself were satisfied of the equitable as well as the legal title of the vendor (*i*). And although the Judges certify in favor of the title, and there is no equitable objection to it, yet if the point of law is doubtful, the purchaser may require another case to be directed, which it seems will not be sent back to the same court (*k*).

(*c*) See 2 Ves. 59.

(*d*) Heath v. Heath, 1 Bro. C. C. 147. [See Cooper v. Denne, 1 Vesey jr. Sumner's ed. 565, 567, note (4) of Mr. Hovenden.]

(*e*) Marlow v. Smith, 2 P. Wms. 198; Mitchell v. Neale, 2 Ves. 679; Shapland v. Smith, 1 Bro. C. C. 74; [Perkins's ed. and notes.] Cooper v. Denne, 4 Bro. C. C. 80; 1 Ves. jun. 565, S. C.; Crewe v. Dicken, 4 Ves. jun. 97; Rose v. Caland, 5 Ves. jun. 186; [Sumner's ed. 188, note (a)] Roake v. Kidd, *ibid.* 647;

Wheate v. Hall, 17 Ves. jun. 80; Sloper v. Fish, Rolls, 29 July 1813; 2 Ves. & Bea. 145; Jervoise v. Duke of Northumberland, 1 Jac. & Walk. 559; Lord Lincoln v. Arcedeckne, 1 Coll. 98.

(*f*) Cooper v. Denne, *ubi sup.*; and see 2 Ves. jun. 100; and *infra*.

(*g*) Roake v. Kidd, *ubi sup.*

(*h*) Fisher v. Barry, 2 Hog. 153.

(*i*) Sheffield v. Lord Mulgrave, 2 Ves. jun. 526.

(*k*) Trent v. Hanning, 10 Ves. jun. 500.

(1) Equity will not compel the specific performance of an agreement of sale, and oblige the vendee to accept a title, which the vendor cannot make out to be clearly good and free from incumbrances. Butler v. O'Hear, 1 Desaus. 382; Lewis v. Herndon, 3 Litt. 358; Kelly v. Bradford, 3 Bibb, 317; Seymour v. Delancey, Hopkins, 436; Brown v. Gilliland, 3 Desaus. 539; Reed v. Noe, 9 Yerger, 283; McComb v. Wright, 4 John. Ch. 659; Sebring v. Mersereau, 9 Cowen, 344; Garnett v. Macon, 6 Call, 308; Bartlett v. Blanton, 4 J. J. Marsh. 428; Young v. Lillard, 1 A. K. Marsh. 482; Cotton v. Ward, 3 Monroe, 309; Brown v. Hafl, 5 Paige, 235; Tomlin v. M'Chord, 5 J. J. Marsh. 135; 2 Story Eq. Jur. §778; Poole v. Shergold, 2 Brown C. C. (Perkins's ed.) 119, note (a); Gans v. Renshaw, 2 Barr, 34. A purchaser cannot be compelled in equity to take land which is involved in doubt or dispute as to boundary. Voorhees v. De Meyer, 3 Sandford Ch. R. 614. But where the vendee proceeds in the treaty for a purchase with a full knowledge of a defect in the title, and does not object to it, he will not for that defect be relieved in equity. Craddock v. Shirley, 3 A. K. Marsh. 288; Roach v. Rutherford, 4 Desaus. 126. See Beverly v. Lawson, 3 Munf. 317, 338; Mayo v. Purcell, 3 Munf. 243; Barrett v. Gaines, 8 Alabama, 373.

(2) Waggener v. Waggener, 3 Monroe, 556.

4. And even the House of Lords, sitting as a court of equity upon appeal, will not in all cases decide the point, but if they think it a doubtful one, will discharge the purchaser from the contract with costs (*l*).

5. In a case before Sir John Leach (*m*), in which he expressed the strong inclination of his opinion in favor of the title, he concluded, that having regard to the proposition that a purchaser is not bound to take a doubtful title, without undertaking to determine precisely the limit and extent of that rule, he was of opinion that the case was, within the sense of that proposition, a doubtful title. In attempting to lay down a rule upon this subject, he should say, that a purchaser is not to take a property which he can only acquire in possession by litigation and judicial decision; that in the case before him, it would be necessary to act in the execution of the trust under the direction of a court, and to compel *the purchaser therefore to take the title would be to compel him to buy a law-suit.

6. In *Marlow v. Smith*, Sir Joseph Jekyll thought the objection to the title valid, and as there was the opinion of learned men against the title, he would not, nor did he think it reasonable that a court of equity should compel the purchaser to accept the title (*n*).

7. Every title, no doubt, is good or bad, and it has been said that the Court ought to know nothing of a doubtful title, but the Court itself has adopted a different principle of decision (*o*) (*1*).

8. It is not now the habit of the Court, whatever may have been the old rule, to decide upon the validity of every title, and leave the unsuccessful party to appeal to the House of Lords; but, although in the judgment of the Court, the better opinion is that a title can be made, yet if there is a considerable, a rational doubt, the Court does not attach so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to their remedy at law (*p*). But as this depends upon the weight which the Judge attaches to the objection in the particular case, it frequently happens that a point of great moment is decided upon,

(*l*) *Blosse v. Lord Clanmorris*, 3 Bligh, Hill, 1 Cox, 186.
62; see 2 Molloy, 580.

(*m*) *Price v. Strange*, 6 Madd. 159.

(*n*) 2 P. Wms. 198; see *Maling v.* 569.

(*o*) 2 Ves. & Bea. 140.

(*p*) 16 Ves. jun. 272; 1 Jac. & Walk.

(1) See *Shapland v. Smith*, 1 Brown C. C. (Perkins's ed.) 75, 76, note (3); *Cooper v. Denne*, 1 Sumner's Vesey, jr. 565, Mr. Hovenden's notes at the end of the case.

as between a seller and buyer, although third persons, whose interests are in question, are not bound by the decision; whilst in other cases a point of easy solution presses perhaps with undue weight upon the mind of the Court, and is consequently treated as too doubtful. The doctrine is intelligible, but whilst it affords no landmark, it offers a ready escape from the necessity of deciding a point of real or supposed difficulty. It is not unusual for parties to file an amicable bill for the settlement of the point in dispute, and although no doubt, if there be any valid objection to the title, the question upon it may thereafter arise between parties who would not be bound by the proceedings in the cause (*q*), yet in such cases the purchaser is generally willing to rely upon the authority of the Judge, whose decision he trusts will be followed even between adverse parties.

9. Although the purchaser, doubting the validity of the title, notwithstanding the decree of the Court, carries the case to the House of Lords, which confirms the decision compelling him to take the title, yet he does not obtain more than a precedent for *a decision in his favor if his title should be attacked by a third party. He does not obtain an absolutely indefeasible title, but as good a warranty as can be procured (*r*).

10. The doubt must turn on a point either of law or of fact, although it sometimes involves both. Where the point is one of law, it mostly depends upon the construction of some instrument,—in some cases the question is, What is the rule of law? The courts have not drawn any distinction between these cases, for if the point of law in the abstract is open to much doubt, they decline to decide it between a vendor and purchaser, just as they refuse to decide upon the construction of a doubtful instrument, where upon the rule of law itself no doubt hinges. Where however the point of law is alone in dispute, the objection that the decision may bind third parties in their absence is entitled to no weight, because, in whatever suits decided, all points of law, as precedents, bind all alike. But a court is tender in deciding doubtful points of law against a purchaser, that is, compelling him to take the title upon its decision, because other courts may not follow that decision in the identical case: the question may again be the subject of litigation commenced in another court by the adverse claimant against the purchaser after he has obtained a conveyance. Where

(*q*) See 4 Myl. & Cra. 470, 473.

(*r*) See 11 Ves. jun. 465; 1 Jac. & Walk. 568.

the doubt turns upon the construction of an instrument, the difficulty that the decision must be come to in the absence of the persons whose claims are in question, although their rights will not be bound by the decision, is entitled to more weight. The distinction is a thin one, for in either case the point is decided in the absence of a person who is not bound by the decision, except so far as it may furnish a precedent against him; but still a Judge may feel himself more at liberty to decide a general point of law between a vendor and purchaser than a question of construction of an informal instrument, which can afford no precedent, and upon which men may naturally differ, and which therefore should, if possible, be decided in the presence of the persons whose interests are affected indirectly, although not bound by the decision.

11. In *Moody v. Walters* (s), Lord Eldon decided that there was no breach of trust in that case by the trustees for preserving contingent remainders having joined in suffering a recovery. This depended upon his view of the rule of a court of equity as applicable to the case before him, and upon this he decided. He then *said, another view in which the case had been put was, whether there was such a doubt upon the title that a purchaser should not be compelled to take it. This, he said, was not a case of this species. If he had doubt upon the point, he should find great reluctance in acting upon it, so as to leave in so much uncertainty this very important branch of the law, but not having that doubt, he was bound to say, first, that this was a good title; next, as to the nature of his opinion, that he had no doubt whether he ought to make the decree, admitting that he certainly should have advised a purchaser to take the opinion of a court of equity.

12. In a later case, where also the title depended upon a recovery, in which the trustees to preserve had joined with the tenant for life and his son tenant in tail in destroying the remainders expectant upon the first remainder in tail, Lord Eldon, after discussing the difficulties arising out of the authorities, added, that as he did not find what he could call a breach of trust, his opinion was, that the contract must be performed, and he would not go the length of saying that this was a case in which, notwithstanding these observations, and though that was his opinion, he could not compel the purchaser to take the title, but he should compel him to take it unless he would reverse his opinion. That, he observed, was formerly the course instead of letting off a purchaser upon a

(s) 16 Ves. jun. 283.

doubtful title, and the purchaser then went to the House of Lords. His opinion was, that the contract ought to be performed, but without costs (*t*).

13. Another purchaser, under the same title as the last, persisted in the same objection after Lord Eldon's decision, and with full notice of it; and the same learned Judge enforced a specific performance, and this time made the purchaser pay the costs (*u*).

14. Lord Eldon thus extracting from the conflicting cases on the subject a negative rule that the act in the particular cases would not amount to a breach of trust, acted upon his opinion, and considered it so strengthened by twice acting upon it, that he fixed the second objecting purchaser with the costs of the suit, and yet *his* only mode of carrying the case to the House of Lords, if he had so desired, was to first resist the acceptance of the title in the Court below. The acquiescence of the purchaser in the first cause in the decision against him, was considered a sufficient ground to throw the costs on the purchaser in the second suit.

*15. But still, in the case of a mere abstract point of law, if even the House of Lords think it a doubtful one, it may decline upon that ground to enforce the completion of the purchase without deciding the point. Thus in a case where, upon appeal to the House of Lords, the question was whether a reversion vested in the Crown by forfeiture, could be barred by a recovery, Lord Eldon said, that the law on this point was not clearly settled, and that he could not advise the House, sitting as a court of equity in appeal, to hold a purchaser to the contract in a case where it could not be stated as a matter free from doubt, whether the reversion had been barred by the recovery; and as the purchaser had been brought into Court upon a doubtful title, he ought to be discharged with costs. Lord Redesdale added, that general opinion was against the title, but that in that case it was not necessary to come to any precise decision on the point. It was sufficient, on the question then before the House, if the law were doubtful. A purchaser had a right to require a marketable title, and this title it must be admitted rested on a point of law which, at least, was doubtful (*v*).

16. Lord Eldon frequently lamented that the Court had not always decided the point at issue and left the purchaser, if he

(*t*) *Biscoe v. Perkins*, 1 Ves. & Bea. 485. *Pearson v. Lane*, 17 Ves. jun. 101; a case upon a partition.

(*u*) *Biscoe v. Wilks*, 3 Mer. 456; see (*v*) *Blosse v. Lord Channorris*, 3 Bligh, 62.

pleased, to appeal to the House of Lords, and in some cases appeared to refer the existing rule to the case of *Shapland v. Smith*; but as Sir W. Grant observed, and as Lord Eldon very well knew, this doctrine is at least as old as *Marlow and Smith*. Lord Eldon in the House of Lords more than once declined to decide a point of law as between a seller and a purchaser, and acted upon the rule in the courts below also, although of course it was competent to the House of Lords to rule the point of law, not certainly as a court of appeal deciding the point between litigating parties adversely claiming the estate, but as a court of appeal in equity, exercising the power which even the Court below has to rule the point of law, and compelling the purchaser to rest upon the validity of that decision; and although the decision would not bind absent parties, yet if deliberately come to it would, like all other decisions of the House of Lords, be binding as a precedent upon the courts below, and would not be disturbed by the House itself without manifest error. It holds out no great invitation for a court below to decide directly upon the validity of a title, and not shelter itself under the doubtful nature of the title when the House of Lords itself, upon appeal, may decline to decide the point of law *and reverse the decision because they consider the question a doubtful one.

17. Where upon an exception to a Master's report that the seller could make a good title, the Court overruled the exception (*x*), from which order the purchaser appealed to the House of Lords, Lord Eldon, C., said, that he considered that before the House should be called upon to give its final judgment the Court of Chancery should decide by a decree whether the title was so clearly good and marketable as to be binding against an unwilling purchaser, and if the Court should decide in the affirmative, and decree a specific performance, then the House of Lords must give its final judgment on the subject; but if in the negative, it might be unnecessary for the House to decide the question, and an order was accordingly made directing the appeal to stand over until the cause should be heard on further directions in the Court below, with liberty to the parties then to apply to the House (*y*).

18. This was a singular order, and it was founded upon the disinclination of the House to force the title upon the purchaser. For

(*x*) *Jenkins v. Herries*, 4 Madd. 67; tion was overruled.

the statement at the conclusion of the report should have been that the excep-

(*y*) *Herries v. Jenkins*, D. P. 1823; 6 Sim. 168, *n. post*.

although the Court below certainly might refuse a specific performance upon the hearing upon further directions, yet that could hardly be presumed, for in overruling the exception the Court, in effect, decided that the purchaser was bound to take the title; the Court, in a suit between a vendor and purchaser, does not, even upon exceptions, decide strictly upon the abstract point of law as between ordinary litigants, but upon the nature of the title being such as a purchaser could be compelled to accept. And if *Jenkins v. Herries*, for example, had been set down before the Court below for further directions, as well as upon the exception, the Court, after overruling the exception, would without any further argument have decreed a specific performance. Notwithstanding the order in *Herries v. Jenkins*, it would not be safe for a purchaser, who objects to a decision upon exceptions in favor of the title, to wait until the decree is made upon further directions before he appeals, for he would probably have to pay the costs incurred subsequently to the hearing upon the exceptions, although his appeal should be successful. It is difficult not to be too early or too late.

19. In these cases, practically, the Judge who decides attends only to the doubt which he himself entertains upon the title. If he sit in a superior Court, he of course acts upon his own doubts, however clear the opinion expressed by the Court below may be, whilst the decision of that Court *against* the validity of the title is not allowed to operate if the Judge in the court of appeal think the title good. Where the Master first, and then the Master of the Rolls, or Vice Chancellor, decide against a title, which has happened in several instances, it is urged, but in vain, before the court of appeal, that the decisions of competent tribunals against the title establish the doubtful nature of it, although the opinion of the Judge having the appellate jurisdiction may be in favor of the title (z).

20. If a purchaser under a decree obtain a conveyance of the supposed adverse title from knowledge acquired as purchaser, it seems that he would not be allowed to set it up as an objection (a).

(z) *Sheppard v. Doolan*, 3 Dru. & War. 1.

(a) S. C.

*SECTION IV.

EXAMPLES OF BAD, DOUBTFUL, AND GOOD TITLES IN EQUITY.

1. *Cases where doubtful.*
2. *Shapland v. Smith : estate tail.*
3. *Wilcox v. Bellaers : estate tail.*
4. *Jerroise v. Duke of Northumberland : executory trust : estate tail.*
5. *Heath v. Heath : executory devise.*
6. *Sharp v. Adcock : fee by devise.*
7. *Price v. Strange : "legal representatives."*
8. *Barclay v. Raine : covenant to produce.*
9. *Sheffield v. Lord Mulgrave : leaseholds for lives.*
10. *Wheate v. Hall : power of sale.*
11. *Cooper v. Denne : confirmation.*
12. *Crewe v. Dicken : trustee's receipt.*
14. *Adams v. Taunton : trustee renouncing.*
15. *Oxenden v. Skinner : portion of tithes.*
16. *Cassamajor v. Strobe : allotment.*
17. *Fort v. Clark : pedigree.*
18. *Sloper v. Fish : escrow.*
19. *Blosse v. Clanmorris : reversion in Crown.*
20. *Colmore v. Tyndale : fee in trustees.*
21. *Lowes v. Lush : act of bankruptcy.*
22. *Cann v. Cann : commission unopened.*
23. *Stapylton v. Scott : entirety or share.*
24. *Hartley v. Pehall : covenant to take beer.*
25. *Jenkins v. Herries : contingency rejected.*
26. *Cases where title held good.*
27. *Lord Braybroke v. Inskip : devise of trust estate.*
28. *Nouaille v. Greenwood : equitable recovery.*
29. *Warneford v. Thompson : power of sale.*
30. *Gibson v. Clarke : grant from the Crown presumed.*
- 31, 76. *Hillary v. Waller : presumption of conveyance.*
- 32, 77. *Emery v. Grocock : presumption of surrender.*
33. *Nouaille v. Greenwood : presumption.*
34. *Monck v. Huskisson : tithe exemption.*
35. *Hasker v. Sutton : contingent remainder destroyed.*
36. *West v. Burney : release of power.*
37. *Howard v. Ducane : sale to tenant for life.*
38. *Biddle v. Perkins : power too remote.*
39. *Strips of waste.*
40. *Rushion v. Craven : quantity of estate.*
41. *Clarke v. Royle : lien for purchase-money.*
42. *Bare possibility no objection.*
43. *Suggestions : suspicions.*
44. *Mines reserved to Crown.*
46. *Mines under common.*
- 48, 59. *Suspicion of fraud in appointment to child.*
50. *Bill filed by adverse claimant.*
51. *Existing right an objection.*
52. *Reservation of mines.*
53. *General description of parcels.*
55. *Reversion : incumbrances.*
57. *Sale under power in mortgage.*
58. *Bankruptcy.*
60. *Title to allotments before award.*
64. *Title to allotments.*
65. *Purchaser taking possession of allotments.*
66. *Equitable title bought under decree, valid.*
70. *Not as against sub-purchaser.*

73. *Infant heir of seller.*75. *Infant trustee acts.*76. *Presumption of conveyance.*77. *Presumption of surrender of term.*

1. THERE is not of course any question of law which may not arise upon a contest between a seller and a purchaser as to the validity of a title; an examination of the points decided would *be foreign to the objects of this work unless where they furnish a general rule by which all purchasers are to be bound, independently of the point of law. But as the practitioner, in considering a particular question upon a title, may wish to see at once how a point of the same nature was treated by the Court, as between a seller and a buyer, I propose to furnish here such a catalogue as will enable a reference to most of the leading points which have arisen in equity, as well in the cases in which the questions have been considered too doubtful to be forced upon the purchaser, as in those where, notwithstanding the difficulty of the question, the purchaser has been compelled to accept the title. The first class are as follows:

2. Whether by devise the legal estate passed to the tenant for life so as to enable his estate for life to coalesce with a subsequent legal limitation to his heirs male of his body (a) (I).

3. Whether by devise a man took an estate tail where, after a devise to him for life, the gift was to such of his children as he should appoint, and their heirs, and for want of appointment, to the heirs of his body and their heirs for ever; and in case he should die without issue of his body, then over to his sister, &c., and in case he should live and have children as aforesaid, then 500*l.* to the sister at twenty-one or marriage (b).

4. Whether under a devise to his son, to be entailed upon his male heirs, and failing such, to pass to his next brother, and so on from brother to brother, allowing 2,500*l.* to be raised upon the estates for female children each, the son took an estate tail (c) (II) (I).

(a) *Shapland v. Smith*, 1 Bro. C. C. 75; *Playford v. Hoare*, 3 You. & Jerv. 175.

(b) *Wilcox v. Bellaers*, Turn. & Russ. 491.

(c) *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559.

(I) In 1795 the heir claiming by purchase the estate, the subject of the suit in *Shapland v. Smith*, brought an ejectment. The claimant under Christopher Shapland, the tenant for life, at first defended the ejectment, but afterwards confessed the action.

(II) This was afterwards, in a family suit, held to be an estate tail.

(1) The subject of estates tail is, in general, regulated by statute in the United States, and the tenure thereby is very much modified. See 1 Cruise Dig. by Mr. Greenleaf, Tit. 2, Estate Tail, ch. 2, §44, where the statutes of several of the States on this subject are referred to.

5. Whether a devise to a son for ever if he have a son who shall attain twenty-one, but if he should chance to die without son to inherit, the son of another son should inherit, created an executory devise, and not a remainder over expectant upon an estate tail (*d*) (1).

6. Whether a fee passed by a will by the application of the words "with all right and title to the same," to previous devises, which could not be settled without litigation (*e*).

*7. Whether the term in a will, "legal representatives," of children as should be dead, meant executors and administrators (*f*).

8. Whether the purchaser could have a valid legal covenant to run with the land to produce the title-deeds (*g*) (2).

9. Whether leaseholds for lives passed under general words in a devise with fee simple estates to uses in strict settlement (*h*) (3).

10. Whether a power of sale inserted in a settlement made under the direction of the Court, was authorized by the will which directed the settlement (*i*). And in another case, whether a power of exchange, executed in aid of an imperfect exchange, was valid (*k*).

11. Whether void leases granted by a tenant for life under a power, were confirmed by a recovery suffered by him and the tenant in tail, and by a conveyance to a purchaser, the lease being recited in the recovery deed and in the conveyance (*l*).

12. Whether one of two trustees to whom the other had conveyed, could alone give a valid discharge for the purchase-money (*m*) (4).

13. Whether one of several trustees for sale under a will having

(*d*) *Heath v. Heath*, 1 Bro. C. C. 147; [Perkins's ed. notes.] see *Roake v. Kidd*, 5 Ves. jun. 647; *Fisher v. Barry*, 2 Hog. 153.

(*e*) *Sharp v. Adcock*, 4 Russ. 374; see now 1 Vict. c. 26.

(*f*) *Price v. Strange*, 6 Madd. 159; *Cotton v. Cotton*, 2 Beav. 67. [2 Jarman, Wills, (2d Am. ed.) 31.]

(*g*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*h*) *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526; see 1 Vict. c. 26.

(*i*) *Wheate v. Hall*, 17 Ves. jun. 80. [Sumner's ed. Mr. Hovenden's note (1).]

(*k*) *Cowgill v. Lord Oxmantown*, 3 You. & Coll. 369.

(*l*) *Cooper v. Denne*, 4 Bro. C. C. 80. [Perkins's ed. notes.]

(*m*) *Crewe v. Dicken*, 4 Ves. jun. 97; *Nielson v. Wordsworth*, 2 Swanst. 365.

(1) See 3 Cruise Dig. Tit. 38, Devise, Ch. 17 and notes, vol. 6, p. 366 et seq.; 1 Jarman, Wills, (2d Am. ed.) Ch. 27, p. 655 et seq. and notes; *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrell*, 15 Pick. 104, 110; *Holme v. Low*, 4 Metcalf, 190.

(2) See 2 Cruise by Mr. Greenleaf, Tit. 32, Deed, ch. 26, §99, vol. 4, p. 393, and note; ante, 453, note.

(3) 1 Jarman, Wills, (2d Am. ed.) 542, and note.

(4) 1 Cruise Dig. by Mr. Greenleaf, Tit. 12, Trust, ch. 4, §35, §36, §37 and notes.

renounced, the continuing trustees could make a good title and give a valid discharge for the purchase-money (*n*).

14. Whether presumption from non-payment of tithe would bar a lay impropiator (*o*).

15. Whether long possession of a portion of tithes justified the presumption of a grant (*p*).

16. Whether an allotment for a right of warren was authorized by an inclosure act (*q*).

17. Where the title was made through tenants in tail claiming by descent, who had not been in possession for a considerable period prior to 1793, and there was no proof of the pedigree except in the recitals in a deed executed in that year (*r*).

18. Whether a conveyance had been executed as an escrow or not (*s*) (1).

19. Whether a reversion which was vested in the Crown by *forfeiture, and not by original grant, could be barred by a recovery (*t*).

20. Whether trustees took the legal fee in a deed under a limitation to them and their heirs, or whether it could be cut down by the context to an estate *pur autre vie* (*u*).

21. Whether an act of bankruptcy having been committed by the vendor, a commission might not issue, although no debt could be shown to exist, and the seller swore there was none (*x*).

22. Whether a commission issued against the seller, but not opened, might not be opened so as to vest the legal estate in the assignees, although the equity was bound by a decree in a suit (*y*).

23. Whether the seller had the entirety of the estate, the doubt arising from expressions in the will under which he claimed (*z*).

(*n*) *Adams v. Taunton*, 5 Madd. 435.

(*o*) *Rose v. Calland*, 5 Ves. jun. 186; see *Mead v. Lord Norbury*, 2 Price, 338; 3 Bligh, 217; *Berney v. Harvey*, 17 Ves. jun. 119.

(*p*) See the judgment in *Oxenden v. Skinner*, 4 Gwil. 1513.

(*q*) *Cassamajor v. Strode*, 2 Myl. & Kee. 706.

(*r*) *Fort v. Clarke*, 1 Russ. 601.

(*s*) *Sloper v. Fish*, 2 Ves. & Bea. 145.

(*t*) *Blosse v. Clannorris*, 3 Bligh, 62.

(*u*) *Colmore v. Tindall*, 2 You. & Jerv. 605; see *Nash v. Coates*, 3 Barn. & Adol. 846.

(*x*) *Lowes v. Lush*, 14 Ves. jun. 547.

(*y*) *Cann v. Cann*, 1 Sim. & Stu. 284.

(*z*) *Stapylton v. Scott*, 17 Ves. jun.

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(1) 2 lb. Tit. 32, Deed, ch. 2, §68 to §76 and notes, vol. 4, p. 29 et seq. Where the future delivery of a deed, handed to a stranger, is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed, until the second delivery; but when thus delivered, it will take effect by relation, from the first delivery. Per Shaw Ch. J. in *Foster v. Mansfield*, 3 Metcalf, 412, 414, 415.

24. Even at law, whether a covenant in a brewer's lease, purporting to bind the assignees, would bind the purchaser, as assignee, to buy his beer of the lessor (*a*).

25. Whether words of contingency can be rejected and the devisee for life be held, upon the construction of the whole will, to take an estate tail in order to include all the issue (*b*). This was so decided against the purchaser upon exceptions, but that decision was not adopted in the House of Lords (*c*); the House resolved to wait for the decree on further directions.

26. On the other hand, in many cases courts of equity have compelled a purchaser, upon their own opinion, to accept a title depending upon questions of great nicety. The leading cases are,—

27. Where it was held that a trust estate passed by a general devise, although the Master had reported that it did not pass, but the Master of the Rolls and the Lord Chancellor ruled differently, and a specific performance was decreed (*d*) (1).

28. Where it was held that an equitable recovery might be suffered without the concurrence of the equitable mortgagee (*e*).

29. Where under an obscure will a purchaser was compelled to *take the title upon the construction that although the legal estate was not given, a power of sale was (*f*).

30. Where a grant from the Crown of an advowson which under general words had been excepted out of an early grant in existence, was presumed against a purchaser, the title being evidenced by conveyances and deeds for a period of nearly one hundred and forty years, and there having been three presentations under them, and none by the Crown (*g*).

31. Where a conveyance of the legal fee was presumed (*h*) (2), as it was considered such a title as a purchaser might safely take.

(*a*) *Hartley v. Pehall*, Peake's Ca. 135; *Bristow v. Wood*, 1 Coll. N. C. 480; see *post*, ch. 14, s. 1.

(*b*) *Jenkins v. Herries*, 4 Madd. 67.

(*c*) MS. 6 Madd. 168, n. The author argued the case in D. P. He believes the case was not carried further: see p. 511, *supra*.

(*d*) *Lord Braybroke v. Inskip*, 8 Ves. jun. 417.

(*e*) *Nouaille v. Greenwood*, Turn. & Russ. 26.

(*f*) *Warneford v. Thompson*, 3 Ves. jun. 513.

(*g*) *Gibson v. Clarke*, 1 Jac. & Walk. 159.

(*h*) *Hillary v. Waller*, 12 Ves. jun. 239; see *Doe v. Davies*, 1 Adol. & Ell. N. S. 430.

(1) 1 Jarman, Wills, (2d Am. ed.) 552 et seq. Ch. 22, §II; Ram. Assets, ch. 4, §7, p. 68, 69; 4 Kent (6th ed.) 538, 539; *Jackson v. Delancy*, 13 John. 537.

(2) 1 Cruise Dig. by Mr. Greenleaf, Tit. 12, Trust, ch. 2, §§39 to 41, and notes, p. 415; 1 Greenl. Ev. §46; *Hillary v. Waller*, 12 Sumner's Vesey, 239 note (b) and cases cited.

32. Where the surrender of a term of years to secure portions was presumed (*i*).

33. Where from an inaccurate statement in a will of a settlement it was presumed that the legal estate was vested in the trustees of the settlement (*k*).

34. Where the title to the exemption of tithe depended on the unity of possession of the rectory, manor, and lands, in one of the greater monasteries dissolved by 31 Hen. 8 (*l*).

35. Where the title depended upon the destruction of contingent remainders (*m*), or upon the statute of limitations, for it is a matter of perfect indifference how the title is made out, provided the purchaser gets a title; whether it be by escheat, abatement, disseisin, intrusion, or possession and non-claim, or destruction of contingent remainders, is a matter of no consequence, provided there be a valid legal title (*n*); and the same rule applies when the Crown is barred under the *nullum tempus* act (*o*). But now a contingent remainder existing any time after the 31st December 1844, is capable of taking effect, notwithstanding the determination by forfeiture, surrender, or merger of any preceding estate of freehold (*p*).

36. Where the title depended upon the ability of a tenant for life to release his power of appointing to his children, or upon the operation of an appointment to a child as controlled by a previous settlement made by that child with the father's concurrence (*q*).

*37. Where the title depended upon the validity of a sale and an exchange to and with the tenant for life, whose consent to either act was necessary, Lord Eldon stating that he should have said originally it would not do, but he thought that it had been settled by the practice of conveyancers (*r*) (1).

38. Where the title depended upon a general power of sale and exchange not being void as tending to a perpetuity (*s*).

39. Where the title depended upon the question, whether strips of land lying between the highway and old enclosures formed part of the estate or belonged to the lord as part of the waste,

(*i*) *Emery v. Grocock*, 6 Madd. 54.

(*k*) *Nouaille v. Greenwood*, Turn. & Russ. 26.

(*l*) *Monck v. Huskisson*, 1 Sim. 280.

(*m*) See *Roake v. Kidd*, 5 Ves. jun. 647; *Kenn v. Corbet*, MS. before Lord Eldon; *Hasker v. Sutton*, 2 Sim. & Stu. 513.

(*n*) *Scott v. Nixon*, 3 Dru. & War. 383.

(*o*) *Tuthill v. Rogers*, 1 Jo. & Lat. 36.

(*p*) See 8 & 9 Vict. c. 19, s. 1, § 7 & 8 Vict. c. 76, s. 8, 13.

(*q*) *West v. Bernay*, 1 Russ. & Myl. 431; *Smith v. Dorch*, 5 Madd. 371.

(*r*) *Howard v. Duncan*, Turn. & Russ. 81.

(*s*) *Biddle v. Perkins*, 1 Sim. 134; see 2 Sugd. Pow. 444.

(1) 2 Cruise Dig. by Mr. Greenleaf, Tit. 32, Deed. ch. 16, vol. 1, p. 179.

which was treated as a question of presumption, and upon the evidence the Court came to the conclusion that the legal presumption did arise that the owner of the adjoining land was entitled to enclose them (*t*) (1).

40. Even where the question upon an obscure will was, upon the part of the seller, argued to be whether the devisee took an estate in tail male, or an estate for life with contingent remainders, a recovery having been suffered, the Court overruled the purchaser's objection, because they saw in the will an evident intention to give to the devisee a much larger estate than he would take under the construction which they who supported the objection contended for, and they were of opinion that he took *such an estate as enabled him to make a good title to the fee*, by the means which he had adopted for that purpose (*u*).

41. And where the title depended upon the right of the preceding seller to a lien for the purchase-money unpaid, a question of great nicety, the Court compelled the purchaser to take the title, prefacing the decree by a declaration that no lien existed (*x*).

42. We have seen, that a purchaser cannot be compelled to take a *doubtful* title (2); but, nevertheless, he will not be permitted to object to a title on account of a bare possibility; because a court of equity, in carrying agreements into execution, governs itself by a moral certainty: it being impossible, in the nature of *things, there should be a mathematical certainty of a good title (*y*). Mere possibilities, Sir W. Grant observed, ought not to be regarded (*z*) (3).

43. Therefore *suggestions* of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be

(*t*) *Seoones v. Morrell*, 1 Beav. 251.

(*u*) *Rushton v. Craven*, 12 Price, 599. There is nothing in the case which warrants the statement in the reporter's abstract about a purchaser's right to object to a doubtful title, nor is the observation in the note to 6 Sim. 169 well founded, viz., that in *Rushton v. Craven*, the declaration that the purchaser was

bound by the opinion of the Court, avoids altogether the real difficulty. I do not find any such declaration, nor would such a declaration alter the case.

(*x*) *Clarke v. Royle*, 3 Sim. 499.

(*y*) 2 Atk. 20; see 3 You. & Coll. 554.

(*z*) 12 Ves. jun. 252.

(1) See Best on Presumptions, ch. XI, p. 240, 241; *Pring v. Pearsey*, 7 Barn. & Cress. 304; *Barrett v. Kemp*, 7 Bingh. 332; 3 Kent (6th ed.) 433, 434.

(2) Ante, 506, and in note.

(3) See ante, 497, in note; *Cooper v. Denne*, 1 Vesey jr. (Sumner's ed.) 565, 567, note (2) of Mr. Hovenden.

objections of such force as to overturn a title to an estate (a). Mere suspicion ending in suspicion, cannot be the legitimate ground of legal decision (b).

44. So where (c), upon a purchase, it appeared that the estate had been originally granted by the Crown, in which grant there was a reservation of tin, lead, and all royal mines, without a right of entry; yet, as there had been no search made for royal mines for one hundred and eleven years, and, upon examination, the probability was great there were no such mines, and the Crown, for want of a right of entry, could not grant a license to any person to enter and work them, Lord Hardwicke decreed a specific performance (1).

45. Lord Hardwicke observed, that it would be of mischievous consequence to allow it to be an objection to a title, that it is derived under a grant from the Crown, in which there is a reservation of such mines, especially as all grants from the Crown have for the most part such a general reservation; but he added, the fact in the present case is, that there has never been an exertion of this right in a single instance, and no probability there ever will. The case, we may observe, depended upon this fact, for however mischievous it might be to allow such a reservation to be an objection to a title, it would have been so under ordinary circumstances.

46. Again, in a recent case (d), where a man articted for the purchase of an estate, with some valuable mines, and would not complete his contract because the mines were under a common, wherein others had a right of common, and consequently he would be subject to actions for sinking shafts to work the mines; Lord Eldon, after showing the improbability of any obstruction from the commoners, said, that in case such an action were brought, he should think a farthing quite damages enough; and therefore decreed a performance *in specie*.

*47. This case, like the last, must be considered to have turned on the improbability of the purchaser being disturbed; otherwise it seems to have gone to the utmost verge of the law; for although

(a) See 2 Atk. 20, *per* Lord Hardwicke; and see Lord Braybroke *v.* Inskip, 8 Ves. jun. 417; Dyke *v.* Sylvester, 12 Ves. jun. 126.

(b) *Per* Dallas, C. J. in Gorton *v.* Sir T. Champneys, Turn. & Russ. 28, cited.

(c) Lyddal *v.* Weston, 2 Atk. 12. See Seaman *v.* Vawdrey, 16 Ves. jun. 390; Barton *v.* Lord Downes, 1 Flin. & Kel. 505; see p. 353, *supra*, p. 521, *infra*.

(d) Anon. Chan. 7th Sept. 1803. MS.

(1) Winne *v.* Reynolds, 6 Paige, 407, cited and stated *ante*, 497, in note.

only such trifling damages could be recovered, yet that would not be a ground for a nonsuit, as was decided in the late case of *Pindar v. Wadsworth* (*e*). The estate, therefore, would subject the purchaser to litigation, whenever malice or caprice might induce any of the commoners to commence actions against him (*l*).

48. So a mere suspicion of fraud, which cannot be made out, will not enable a purchaser to reject the title. This was decided by Lord Eldon in a case where, under an exclusive power of appointment, a father appointed to one son in fee; and then the father and his wife and the son joined in conveying to a purchaser, and the money was expressed to be paid to them all. The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase-deed recited that the contract was made with the father and son. And it was insisted that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase (*f*).

49. And the mere circumstance of a notice having been given by the other children to a purchaser, that they will impeach the appointment, will not prevent a specific performance, unless the notice is acted upon, or facts are brought forward to impeach the appointment (*g*).

50. It is not a conclusive objection to a title that a third party has filed a bill against the seller, claiming a right to the estate, but the nature of the adverse claim will be examined into (*h*).

51. If any person has an interest in or claim upon the estate which he may enforce, a purchaser cannot be compelled to take the estate, however improbable it may be that the right will be exercised. Thus, in the case of *Drewe v. Corp* (*i*), the vendor was

(*e*) 2 East, 154.

(*f*) *M'Queen v. Farquhar*, 11 Ves. jun. 467. See *post*, ch. 23; and see *Barnwall v. Harris*, 1 Taunt. 430; *Boswell v. Mendham*, 6 Madd. 373; *Campbell v.*

Horne, 1 You. & Coll. C. C. 664.

(*g*) *Green v. Pulsford*, 2 Beav. 70.

(*h*) *Osbaldeston v. Askew*, 1 Russ. 160.

(*i*) Vide *supra*, p. 343.

*entitled to an absolute term of four thousand years in the estate, and also to a mortgage of the reversion in fee, which was forfeited but not foreclosed. It was decided, that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the reversion, although it was evidently highly improbable that any one would ever willingly redeem a forfeited mortgage of a dry reversion expectant upon an absolute term of four thousand years.

52. So in a case (*k*), where it appeared that in 1704 the estate was sold with a reservation of salt works, &c. with a right of entry, and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised; the Master of the Rolls was of opinion that non-user did not in this case raise the inference that the right was abandoned, and consequently the purchaser was entitled to take the objection, and he distinguished this from the case of *Lyddal v. Weston* (*l*); first, because it was not alleged that there was no probability of mines, it was rather admitted that there were: secondly, here was the reservation of a right of entry, upon the want of which Lord Hardwicke laid stress in that case. In the case at the Rolls, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

53. In a case where a close called the Croyle had always been known by that name, and had been possessed by the seller and his ancestors as part of the estate sold, but no mention was made of it in the deeds by name, and all the other lands were particularly described; the Court considered the evidence of title to be merely that of long possession, and held that the purchaser was not bound to accept the title (*m*).

54. But where it is established by evidence that a copyhold estate sold has continually passed and been enjoyed by the description contained in the court rolls, it is not material that there is only a general and vague description of the estate on the rolls (*n*), and the purchaser will be compelled to take the title.

55. Where a vendor was tenant in tail, with reversion to himself in fee, and the reversion had vested in different persons, a common

(*k*) *Seaman v. Vawdrey*, 16 Ves. jun. 390.

(*m*) *Eyton v. Dicken*, 4 Price, 393.

(*n*) *Long v. Collier*, 1 Russ. 267.

(*l*) *Supra*, p. 519.

recovery was generally required by a purchaser; because that *barred* the remainder, while a fine let it into possession, and thereby *subjected the whole fee to any incumbrance which before affected the reversion only. But unless some incumbrance appeared, or the title to the reversion was not clearly deduced, the Court would not compel a vendor to suffer a recovery on account of the mere probability of the reversion having been incumbered (I).

56. Thus in a case (o) upon an exception to the Master's report in favor of the title, the objection to the title was, that one Elizabeth Baker ought to join in a recovery; the title being derived from John Pain, who, in 1693, limited the estate to the use of himself for life; remainder, subject to a term, to uses which never arose; remainder to his daughters in tail; remainder to himself in fee. Under these limitations, Elizabeth, an only daughter, became seised in tail, with the immediate reversion to her father, who made a will, not executed so as to pass real estate, whereby he devised all his estate to his second wife. Upon his death, Elizabeth his daughter entered, and levied a fine. She had issue a daughter, Elizabeth, who married William Baker. They had issue one daughter, Elizabeth Baker. From her the estate was purchased under a decree, and by mesne purchases became vested in the plaintiff. The defendant, the purchaser, suggested, that the ultimate remainder in fee might have been by deed or will disposed of by John Pain, or by any other person to whom it might have descended; and if the same should have been so disposed of, it could then be barred only by Elizabeth Baker. The Lord Chancellor held a recovery not necessary.

57. At this day it frequently happens, that in deeds securing debts on real estate, the estate is authorized to be sold without the assent of the owner, in case default is made in payment of the money on the day named (I). Such a security is so far a mortgage, that the owner may at any time before a sale require a reconvey-

(o) *Sperling v. Trevor*, 7 Ves. jun. 497.

(I) This is allowed to remain as an illustration of the doctrine, and as applicable to existing titles, although the law is now altered by the 3 & 4 Will. 4, c. 74; *post*, ch. 11, s. 4.

(1) The validity of such a power of sale is now generally admitted, both in the United States and in England; it being subject to the control of Chancery, when about to be exercised in a manner oppressive to the debtor. *Matthie v. Edwards*, 2 Coll. C. C. 465; 10 Jurist, 347; 11 Jurist, 761; *Jones v. Matthie*, 11 Jurist, 504; *Jackson v. Henry*, 10 John. 185; *Carson v. Blakey*, 6 Missouri, 273; *Eaton v. Whiting*, 3 Pick. 484, 491; *Kinsley v. Ames*, 2 Metcalf, 29; *Waters v. Randall*, 6 Metcalf, 483, 484; *Doolittle v. Lewis*, 7 John. Ch. 50; *Demarest v. Wynkoop*,

ance upon paying the money due (1); and in consequence of the old rule, that once a mortgage always a mortgage, the owner is in these cases usually required to join in the conveyance, which he is mostly unwilling to do; his object being to prevent a sale. But it has been decided by Lord Eldon, that the objection cannot be sustained, and this decision was made in a case where the deed was in form a regular mortgage with a power of sale, and the mortgagor in his answer stated that he actually resisted the sale as having been *made without his consent and at an undervalue (*p*). This has been followed in many later cases, and is now an established rule (*q*) (2).

58. We have seen that where an act of bankruptcy has been committed, the purchaser cannot be compelled to take the title, although the vendor swear that he owes no debt upon which a commission can issue, and the purchaser cannot disprove the statement (*r*). And upon the same principle, a purchaser who has become bankrupt cannot compel a conveyance of the estate to him; because he cannot satisfy the vendor that he will be entitled to retain the purchase-money (*s*) (1).

59. A purchaser from a father, who was tenant for life, and obtained a conveyance from his son, who was tenant in tail in remainder, in consideration of a life annuity and a debt due to the father, is entitled to evidence that the debt was due, and of the fairness of the transaction (*t*).

(*p*) *Clay v. Sharp*, and others, Ch. Mich. Term. 1802, Lib. Reg. A. 1802, fo. 66, Appendix, No. 12.

(*q*) *Baker v. Dibbin*, *Dibbin v. Baker*, Exch. April 20, 1812. MS.; *Corder v. Morgan*, 18 Ves. 344; *Alexander v. Crossbie*, 6 Ir. Eq. Rep. 513; *Note*, *Stabback v. Leatt*, Coop. 46, which was taken from

a hasty note on a brief, is not, when attentively considered, an authority the other way; see ch. 1, s. 6.

(*r*) *Lowes v. Lush*, 14 Ves. jun. 547; *Cann v. Cann*, 1 Sim. & Stu. 284.

(*s*) *Franklin v. Lord Brownlow*, 14 Ves. jun. 550.

(*t*) *Boswell v. Mendham*, 6 Madd. 373.

(1) But where the purchaser has not notice he is safe; see p. 191; *post*, ch. 21, s. 3.

3 John. Ch. 144 to 146; *Wilson v. Troup*, 7 John. Ch. 25. This power of sale is regulated by statute in some of the States, and in others it remains as at common law. 1 Cruise Dig. by Mr. Greenleaf, Tit. 15, ch. 1, §44 in note, Ch. 6, §1 in note.

(1) See *Eaton v. Whiting*, 3 Pick. 484, 491.

(2) A sale under a power in a mortgage, is final and conclusive, as against *bona fide* purchasers, and it is a foreclosure and bar to the equity of redemption. *Doolittle v. Lewis*, 7 John. Ch. 50; *Jackson v. Henry*, 10 John. 185; *Carson v. Blakey*, 6 Missouri, 273; *Eaton v. Whiting*, 3 Pick. 484, 491; *Kinsley v. Ames*, 2 Metcalf, 29; *Waters v. Randall*, 6 Metcalf, 483, 484. This power is irrevocable and may be executed after the death of the mortgagor. *Bergen v. Bennett*, 1 Caines Cas. Err. 1. After such a sale the interest of the mortgagor is wholly divested, and he becomes a tenant at sufferance. *Kinsley v. Ames*, 2 Metcalf, 29; 1 Cruise Dig. by Mr. Greenleaf, Tit. 15, ch. 1, §44, in note.

60. Where an estate was sold without any notice that it was recently allotted under an inclosure act, and it appeared that the commissioners *had not made their award*, and the act contained no clause authorizing a sale before the award, Lord Ellenborough held that the purchaser was warranted in refusing the title (*u*). But if the purchaser is at the time aware that the estate is in a progressive state of inclosure, and there is a clause authorizing a sale before the award, and there is no ground to suppose that the commissioners will vary the allotments, assuming their power to do so, the purchaser will be compelled to take the title, although the award is not executed (*x*); for a purchaser purchasing, as in this instance, with full notice of all the circumstances, must take subject to the variation, as it was inherent in the very nature of the property. This decision, which was made by Sir William Grant, *at the Rolls, was confirmed by Lord Eldon on appeal, who, according to my note, relied very much on the statement in the particulars of sale, that the estate was in a progressive state of inclosure.

61. But care must be taken in these cases to ascertain that the power of sale does carry the legal estate before the award (*y*). Where the estate, in respect of which the allotment is made, is itself conveyed, of course it carries the right to the allotment with it, and it requires no special clause in the Act to give legal validity to such a conveyance. This appears to have been the point decided in *Doe v. Willis* (*z*), which seems to have been misunderstood, and is said to have been disapproved of and overruled by the Master of the Rolls in *Mortlock v. Kentish* (*a*). But this is probably an erroneous statement.

62. In a late case, a provision that the lands to be allotted and awarded, immediately after such allotments were made, should enure to the persons to whom they were allotted, who should from thenceforth stand seised thereof to the uses of the land in lieu of which the allotments were made, was held to give the legal estate immediately after the allotment and before the award, so as to enable the sale and conveyance of it; for the words, so to be allotted and awarded, were held to mean to be allotted, and respecting which an award shall afterwards be made, and the latter part

(*u*) *Lowndes v. Bray*, Sitt. after T. Term. 1810; *Cane v. Baldwin*, 1 Stark. Ca. 65.

(*x*) *Kingsley v. Young*, MS. 17 Ves. jun. 468; 18 Ves. jun. 207.

(*y*) *Farrer v. Billing*, 2 Barn. & Ald.

171; see *Ellis v. Arnison*, 5 Barn. & Ald. 47; *Doe v. Neeld*, 3 Mann. & Gran. 271.

(*z*) 5 Bing. 441.

(*a*) 26 July 1833; 5 Adol. & Ell. 670, cited.

of the clause, that the persons to whom the allotments should be made should stand seised of them to the old uses, gave the legal fee (*b*). There was a power to award allotments to purchasers of interests in the open fields, &c., who, after the execution of the award, were to hold and enjoy the allotments as the vendor could have done, in case such sale had not been made. This power was not relied upon by the Court, but it seems rather to afford a ground against the legal estate passing under the clause upon which the decision was founded.

63. In *Kingsley v. Young*, already referred to, it was not doubted that a clause authorizing a mortgage, sale, or demise of any allotment before the execution of the award, which was to be effectual in the law, passed the legal estate before the award. And this was admitted to be law in the later case of *Farrer v. Billing* (*c*), in the King's Bench. In that case, however, a power to sell before the execution of the award was held, upon the expressions *in the act, and with reference to the provisions in the general inclosure act (*d*), not to authorize the conveyance of the legal estate before the award.

64. In purchasing an allotment under an inclosure act, it should, of course, be ascertained that the allotment was authorized by the act (*e*), and if it be taken in exchange, that the power was pursued, for the commissioners are not at liberty, although they have frequently exercised the power, to throw the old inclosures intended to be exchanged into the general mass, and then to make allotments for the common rights and old inclosures without distinction (*f*). The exchanges must be distinctly shown to be such on the face of the award (*g*).

65. If a purchaser be let into possession of an allotment before the award, and do not complete his purchase, the seller may turn him out by ejectment, although he has been twenty years in possession, and he cannot raise the objection that no award has been executed (*h*).

66. It hath before been observed, that a purchaser will not be compelled to take an equitable title; but this rule does not extend

(*b*) *Doe v. Saunders*, 5 Adol. & Ell. 664.

(*c*) 2 Barn. & Ald. 171.

(*d*) 41 Geo. 3, c. 109, s. 16; 1 & 2 Geo. 4, c. 23; and see 3 & 4 Will. 4, c. 87, as to past awards.

(*e*) *Cassamajor v. Strode*, 2 Myl. & Kee. 706.

(*f*) *Wingfield v. Tharp*, 10 Barn. & Cress. 785.

(*g*) *Cox v. King*, 3 Bing. N. C. 795; see as to exchanges, *Doe v. Neeld*, 3 Mann. & Gran. 271.

(*h*) *Doe v. Edgar*, 2 Bing. N. C. 498; see *Doe v. Hellard*, 9 Barn. & Cress. 789; *post*, ch. 11, s. 5.

to estates sold before a Master under the decree of a court of equity, where the legal estate is vested in an infant, for the Court in such a case will compel the purchaser to complete his contract on the usual decree, that the infant shall convey when he comes of age, *unless he then shows cause to the contrary*; and that the purchaser shall in the meantime hold and enjoy; because he buys with notice, and it is said it must be presumed that, in the price given for the estate, allowance was made for the infancy of the heir (*i*) (1).

67. Thus in a case (*k*) where, upon sale of an estate before a Master, in pursuance of a decree under Lord Waltham's will, the purchaser objected to the title, on the ground of the legal estate being in an infant; Lord Rosslyn, without the least hesitation, compelled the purchaser to take the title, making his decree for the infant to convey in the usual form; because, as the purchaser bought under the decree, he was bound to accept such a title as the Court could make him (*l*). And I learn that in a case of this *nature, Lord Rosslyn would not sanction an application by the purchaser, at his own expense, for an act of parliament to divest the infant of the legal estate. Nor, if the estate be copyhold, will the Court retain any part of the purchase-money in order to defray the expense of the fine that would be payable, in case the infant heir should die before he surrendered (*m*).

68. But in a case of a sale under a decree of a copyhold estate for payment of debts with which the estate was charged, where the conditions of sale provided that the sellers should procure the surrenders, and the remainder-man had gone abroad, and so a surrender from him could not be obtained, Lord Eldon refused to order the money into Court. He said that the Court would struggle to get over an objection to an application of this sort, but if it was coupled with such a circumstance as that some time might elapse before the surrender or conveyance was got, it would hesitate before it made the order. In the case of an infant, the purchaser had no reason to complain; but in this case, the Court declared nothing upon its record as in the case of infancy. The noncom-

(*i*) 3 Swanst. 566, *per* Master of the Rolls. decree will not be compelled to take a doubtful title. See Marlow v. Smith, 2

(*k*) Ch. MS. See Chandler v. Beard, P. Wms. 198.

1 Dick. 392.

(*m*) Morris v. Clarkson, 1 Jac. & Walk. 601, n.; 3 Swanst. 558.

(1) But see Bryan v. Read, 1 Dev. & Bat. Eq. 86, where it was held that, on a bill for specific performance the vendee will not be compelled to take a title founded on a decree against an infant, because the latter may show cause against it when of age.

pliance with the conditions of sale might in this case annul the contracts (*n*).

69. Nor although the sale is under a decree can equity make a man take a title which he is to support by a bill for an injunction (*o*).

70. And although a purchaser *under a decree* will be compelled to accept a title of this nature, yet, if he sell the estate, the Court will not enforce a specific performance against the second purchaser.

71. This was also decided by Lord Rosslyn. The purchaser of Lord Waltham's estate sold the estate to a person who objected to the title upon the same ground as he had objected to it, and refused to complete the contract. The first purchaser very confidently filed a bill for a specific performance, but Lord Rosslyn dismissed it; because such second purchaser *did not buy under the decree*, and therefore was not compellable to accept an equitable title (*p*).

72. But where the estate is not sold by the Court, although the purchaser agree to go before the Master upon a reference of title in a suit in Court for the administration of the estate, yet he is not bound to take an equitable title (*q*).

73. In a case where a seller after the contract died intestate, *leaving an infant heir, who filed a bill against the purchaser, praying that he might elect either to complete or abandon the contract; and the purchaser submitted to perform the contract, and paid the purchase-money into Court, the Master of the Rolls refused to pay it out without the consent of the purchaser during the infancy of the heir (*r*).

74. In another case, where after a contract for sale the seller died intestate, leaving an infant heir, and his widow, who was his administratrix, filed a bill for a specific performance against the purchaser and the heir, it was decreed, and a day given to the heir to show cause (*s*). But the objection, that the purchaser was not bound to accept the title in consequence of the infancy of the heir, was not taken (*t*) (1).

(*n*) Noel v. Weston, Coop. 138.

(*o*) Shaw v. Wright, 3 Ves. jun. 22, 603.

per Lord Rosslyn.

(*p*) MS.; Powell v. Powell, 6 Madd.

53.

(*q*) Cann v. Cann, 1 Sim. & Stu. 284.

(*r*) Bullock v. Bullock, 1 Jac. & Walk.

603.

(*s*) Holland v. Hill, Rolls, 18 Mar.

1818, MS.

(*t*) King v. Turner, 2 Sim. 549.

(1) See Bryan v. Read, 1 Dev. & Bat. Eq. 86, cited ante, 525 in note.

75. But the acts of the 1 Will. 4, to which we have already referred (*u*), remove most of these anomalies by enabling the Court to make a good legal title. With this view, as we have seen, a tenant for life may convey the inheritance; an infant may convey as if he were an adult; and a committee may convey in the place of the lunatic (*I*). And a devisee subject to a charge, who refuses to convey after a sale under a decree with an order that all proper parties shall join in the conveyance, may be divested of his estate by a conveyance by a third party under the direction of the Court (*v*). And by a later act, an executor or administrator of a mortgagee entitled to the mortgage money, was authorized, upon redemption, to convey the legal estate in the land where possession had not been taken by virtue of the mortgage, and no action or suit was depending (*x*); but this provision has been repealed, as from the 1st of October 1845 (*y*).

76. Although an estate is not sold under a decree, and the legal estate appears to be outstanding, and cannot be got in, yet, if the circumstances of the case are such as would induce a court of law, *under those grounds upon which presumptions are in general raised, to presume a reconveyance, the purchaser will be compelled to take the title (*z*). Reconveyances have been frequently presumed upon trials at law in favor of justice; but this doctrine was never applied to a contract between a vendor and purchaser, until the case of *Hillary v. Waller*, which has not met with the approbation of the bar. The decision has occasioned considerable difficulties in practice. As no man can say where exactly the line is to be drawn, at what period the presumption is to arise, and what

(*u*) *Supra*, p. 224; *Jemmett on the Statutes*; see *Price v. Carver*, 3 Myl. & Cra. 157; *Jones v. Ham*, 3 Ir. Eq. Rep. 65.

(*v*) 1 Will. 4, c. 60, s. 8; *Robinson v. Wood*, 5 Beav. 246.

(*x*) 7 & 8 Vict. c. 76, s. 9.

(*y*) 8 & 9 Vict. c. 106, s. 1.

(*z*) *Hillary v. Waller*, 12 Ves. jun. 239; *Emery v. Grocock*, *ex parte Holman*, *post*, ch. 15, s. 4; but see *Goodright v. Swymmer*, 1 Kenyon, 385; *Keene v. Deardon*,

8 East, 248; *Doe v. Brightwen*, 10 East, 583, which show that the circumstance of the equitable estate being in the person who claims the benefit of the presumption, is not sufficient of itself to raise it; and see *Barnwell v. Harris*, 1 Taunt. 430; *Doe v. Calvert*, 5 Taunt. 170; *Cooke v. Soltau*, 2 Sim. & Stu. 154; and see 10 Barn. & Cress. 312; *Noel v. Bewley*, 3 Sim. 103; *Doe v. Davies*, 1 Adol. & Ell. N. S. 430.

(*I*) An act has just passed (3 Vict. c. 60,) which extends the 1 Will. 4, c. 47, so as to authorize courts of equity to direct *mortgages* as well as sales of estates of infants, heirs, or devisees, and also of estates devised in settlement, and to authorize such *sales* and mortgages to be made in cases where such tenant for life or other person having a limited interest, or such first executory devisee is an infant. The writer did not object to this act, but *sales* by such persons, being infants, were already fully provided for by the 1 Will. 4, c. 47, and 1 Will. 4, c. 60.

circumstances are sufficient to rebut it, each party puts his own construction on almost every case which arises. This, of course, leads to endless discussion and expense, and the very parties in whose favor the doctrine was introduced, ultimately feel how much it would have been to their interest, that the general rule of the Profession had not been relaxed. This rule was, that a vendor was bound to get in all outstanding legal estates, which were not barred by the statutes of limitations. The certainty of the rule amply compensated for any individual hardship which it might sometimes occasion. And now that the time is shortened by the late statute of limitations, there is less room than before for presuming a conveyance of a legal estate against a purchaser.

77. In *Emery v. Grocock* (a), the Vice Chancellor, Sir John Leach, stated the rule to be, on presuming a surrender of a legal term, as between a seller and purchaser, that if the case be such that, sitting before a jury, it would be the duty of a Judge to give a clear direction in favor of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a Judge to leave it to the jury to pronounce upon the effect of the evidence, then it was to be considered as too doubtful to conclude a purchaser. He added, that he should consider it his duty to give a clear direction to the jury, that they were bound to find the term surrendered, and he must therefore hold that there was no sufficient doubt to entitle the purchaser to be relieved from the contract (b).

(a) 6 Madd. 51; and see *ex parte Holman, post*, and ch. 15, s. 4.

(b) See now 8 & 9 Vict. c. 112, for the cesser of satisfied terms.

*SECTION V.

OF GOOD AND DOUBTFUL TITLES AT LAW.

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| 1. <i>Good titles at law.</i> | 7. <i>Wilde v. Fort.</i> |
| 2. <i>Alpass v. Watkins: estate tail.</i> | 9. <i>Curling v. Shuttleworth.</i> |
| 3. <i>Romilly v. James: estates tail by im-</i>
<i>plication.</i> | 10. <i>Boyman v. Gutch.</i> |
| 4. <i>Boyman v. Gutch: ambiguous pro-</i>
<i>viso.</i> | 12. <i>Equitable objections allowed at law.</i> |
| 5. <i>Doubtful title not recognised at law:</i>
<i>Hartley v. Pehall; Oxenden v.</i>
<i>Skinner.</i> | 13. <i>Alpass v. Watkins.</i> |
| | 14. <i>Elliot v. Edwards; Johnson v. John-</i>
<i>son; Maberley v. Robins.</i> |
| | 15. <i>Willett v. Clarke.</i> |
| | 17. <i>Seller must have the legal estate.</i> |
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1. Of the decisions at law, a few instances may suffice where a purchaser has been compelled to take a title depending upon ambiguous instruments as a good one.

2. Where in a settlement there was a limitation to the intended husband for life, remainder to the intended wife for life, remainder to the heirs of the body of her by him to be begotten, *and of their heirs and assigns for ever*, and *for want of such issue* to his right heirs, it was held to be an estate tail (a).

3. Where by a will the testator devised the bulk of his estates to his brother in fee, and a particular estate to his nephew in fee, and in case his brother and nephew should happen to die, having no issue of either of their bodies, then he gave all his real estate to another in fee, it was held that the nephew took an estate tail, remainder by implication to his father in tail, remainder to the devisee over in fee (b) (1).

4. Where the title depended upon the construction of an ambiguous proviso suspending a power of sale (c).

5. We may now inquire whether, where an action is brought against a purchaser for non-performance of an agreement, a court of

(a) *Alpass v. Watkins*, 8 Term Rep. 516.

(b) *Romilly v. James*, 1 Marsh. 592.

(c) *Boyman v. Gutch*, 7 Bing. 379.
See *Curling v. Shuttleworth*, 6 Bing.

121.

(1) 1 Jarman, Wills, (2d Am. ed.) 448 to 451.

law will act upon the doctrine of equity as to a doubtful title. In a case before Lord Kenyon at *nisi prius* (*d*), where an objection was made to the title, he said he would not then determine the point, nor was it necessary to do so. He thought it a question of *some nicety; but whether it was or not, he thought it equally a defence to the action. When a man buys a commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least, in a court of law (*I*) (*1*). No man is obliged to buy a law-suit; and a verdict was given for the purchaser. Lord Kenyon, however, expressed a different opinion in a later case, where the question was, whether a grant could be presumed of a portion of tithes. He said, that a court of equity in these cases has a discretion, which he, sitting where he did, could not exercise, as he was bound to tell the jury that the plaintiff, the purchaser, could not recover his deposit if there were a good title to the tithes; and on all the circumstances, he thought there was a good title. He added, however, that he thought he should exercise his discretion in a court of equity in the same way he did his judgment there, where he was bound by strict law, and must tell the jury there was a good title (*e*).

6. And the same learned Judge even held, as we shall presently see, that a court of law could only look at legal, and not at equitable objections in actions between a vendor and purchaser.

7. In a case in the Common Pleas, Mansfield, C. J., was of opinion that the objection taken was a solid one, but that at all events the purchaser was not bound to try that question (*f*). But in a later case, in the same court, when Gibbs was Chief Justice (*g*), where the same argument was urged on behalf of a purchaser who was plaintiff, the C. J. said, it was intimated that if any doubt could be cast on the title of the vendor, the plaintiff would be entitled to recover back his deposit. Now, if he had gone into a court of

(*d*) *Hartley v. Pehall*, Peake's Ca. 131; *Wilde v. Fort*, 4 Taunt. 334.

(*e*) *Oxenden v. Skinner*, 4 Gwil. 1513.

(*f*) *Wilde v. Fort*, 4 Taunt. 334.

(*g*) *Romilly v. James*, 1 Marsh. 600.

(*I*) This expression seems to refer to the question, whether equitable objections to a title are a defence at law. *Vide infra*, p. 532.

(1) See *Garnett v. Macon*, 6 Call, 308; *Roach v. Rutherford*, 4 Desaus. 183; *Tharin v. Ficklin*, 2 Richardson, 361; *Breithaupt v. Thurmond*, 3 Richardson, 216. In an action to recover the whole or a part of the purchase money of lands sold, proof of a want of title in the vendor to the property, is a complete defence in law and in equity, and such evidence is admissible. *Miles v. Stevens*, 3 Barr, 21; *Whitehurst v. Boyd*, 8 Alabama, 375; *Tyler v. Young*, 2 Scammon, 441; *Myers v. Aikman*, 2 Scammon, 452; *Duncan v. Charles*, 4 Scammon, 561.

equity, the Chancellor would not, perhaps, have obliged an unwilling purchaser to ratify the contract. But if he come into a court of law to recover the deposit, on the ground of an insufficient title, he must abide by the decision of that court, and that is the difficulty which the party had brought upon himself by coming into a court of law.

8. And in another case, Gibbs, C. J., observed, that it had been determined that if parties resort to a court of law for their judgment on a title, they must be content with the judgment of the court of law; and if that court says the title is good, the party who comes for the judgment of the court shall be bound by it, however *doubtful the point, and shall not afterwards refuse the purchase because it was a doubtful one (*h*).

9. Yet in a later case in the same court (*i*), where the question turned upon, whether a later charge by way of mortgage, without any power of sale, had destroyed a power of sale in a former mortgage, and the property was proposed to be sold *under a power*, Tindal, C. J., observed, that the rule was, that where upon a sale there is such a doubt upon the vendor's title as to render it probable the purchaser's right may become a matter of investigation, the Court will not compel him to complete the purchase. Here, according to the conditions of sale, the policy was to be sold under a power, the vendors, therefore, should have shown an unquestionable power; for there are no means of calculating the compensation to be allowed in case of any mistake. Supposing the power to have been only suspended, there may be a candid doubt how far that suspension may be considered to operate in a court of equity; and if there were a reasonable degree of doubt, the Court would not expect the purchaser to proceed. The other Judges concurred in this view, and the purchaser recovered his deposit.

10. But in the last case upon this subject, in the same court, where also the point depended upon (*k*) the construction of a power—a power of sale with a proviso suspending it—the former case of *Curling v. Shuttleworth* was cited in the argument, and Alderson, J., observed, that that case had been questioned in the Court of King's Bench; and in delivering the judgment of the Court, Tindal, C. J., in stating the question to be decided, observed, that they were not to consider themselves as a court of equity, where the seller is seeking to enforce the purchase by bill for a

(*h*) Sec 5 Taunt. 626, 627.

(*i*) *Curling v. Shuttleworth*, 6 Taunt. 121.

(*k*) *Boyman v. Gutch*, 7 Bing. 390.

specific performance,—in which case that court frequently refuses the aid of its authority to enforce a performance where the title is of an unmarketable or even doubtful description, leaving the party to his action at law for damages,—but they were called upon to answer the simple question upon the record, whether, on the construction of a deed, the defendant has or has not a legal title to convey to a purchaser. After examining the question upon its merits, the Chief Justice added, that it appeared to the Court that the defendant had, at the time the interest was exposed to sale, the right to put up the same to sale, and to sell the same. Whether a court of equity would compel a purchaser to accept such a title was a question which they were not called upon to determine. All *that they professed to determine was, the legal construction of the deed, which appeared to them to negative the purchaser's allegation. They therefore thought there was no defect of title in the defendant.

11. This, as was long since observed in this work, seems to be the true rule. The courts have taken no distinction between the cases where the purchaser is plaintiff, and where he is defendant. Where he is plaintiff, he, of course, by this rule encounters the risk of being compelled to take a title which a court of equity would not force upon him; a purchaser, therefore, should not bring an action, if he can avoid it, where the title is of a doubtful nature; but in many cases he cannot avoid it, for the vendor may refuse to take a step, and he may wish to recover his deposit. Where the seller brings an action, the purchaser may avoid the strict rule of law by filing a bill for a specific performance, or for his deposit, if a good title cannot be made, taking care not to allege that the seller cannot make a title (*l*).

12. But after some difference of opinion it appears to be settled, as no doubt the rule should be, that even in a court of law equitable objections to a title may enable a purchaser to resist a contract, or to rescind it.

13. In a case before Lord Kenyon (*m*), where a purchaser sought to recover his deposit, on the ground that although the seller could make a legal title under a settlement, yet in equity he would be compelled to resettle it, the Chief Justice observed, that sitting in a court of law, they could not take notice of an equitable title, and that the defendant could make a good legal title could not be doubted. He was clearly of opinion that sitting, therefore, in a

(*l*) See p. 26, *supra*.

(*m*) *Alpass v. Watkins*, 8 Term Rep. 516.

court of law, they could not do otherwise than determine that the defendant might make a good title to the plaintiff, and consequently was not liable to repay the deposit money.

14. But in a case before the Common Pleas (*n*), where the purchaser brought his action to recover the deposit on the ground of an equitable lien for part of the price upon a former sale, Lord Alvanley, in delivering judgment, observed, that if the purchaser would be liable in equity, that would be a sufficient objection. After showing the nature of the equity, he added, that he thought a court of equity would hold it to be a lien, though he did not know that it would be binding at law. Now what was the nature of the purchaser's deposit? Was it not made upon the condition *that the purchase should be completed free from all reasonable objections? It was quite clear that a court of equity would not compel a specific performance of the agreement for the purchase of these premises. He thought that the purchaser had made out a reasonable objection to the title offered by the defendant, and consequently must recover his deposit, and the other Judges concurred in this view. This case is certainly a very strong authority, because no Judge sitting in a court of law could be more averse than Lord Alvanley was to assume any equitable jurisdiction (*o*). His decision was followed in a later case (*p*): A mere trustee in fee of the legal estate, sold the estate without the concurrence of his *cestuis que trust*, who were infants (*I*). The purchaser brought an action to recover his deposit. Gibbs, C. J., referred to the decision that a purchaser must take the title if the court of law thought it a good one, however doubtful the point, but the doctrine had never been carried to the extent the defendant then contended for. Here was a contract to make out a good title. If that contract were a contract to make a good title both at law and equity, and the contract were brought before that Court (C. P.), they must collaterally look to see whether the title be good in equity as well as at law; it was true they sat there only as a court of law to administer the legal rights which arise out of the contract, but one of those rights is to have a title good in equity. See to what a length the

(*n*) *Elliot v. Edwards*, 3 Boss. & Pull. Pull. 162.
 181. (*p*) *Maberley v. Robins*, 5 Taunt. 625;
 (*o*) See *Johnson v. Johnson*, 3 Bos. & 1 Marsh. 258.

(*I*) There is a mistake in the report in Taunt. The devise, I suppose, was to the trustees to sell, and not, as stated, in trust for Lady Read.

defendant's doctrine would proceed. If a deed appeared on the abstract whereby lands were conveyed to *A* and his heirs to the use of *B* and his heirs, in trust for *C* and his heirs (I), it would prove that a good title at law was made out in *B* and his heirs, to convey without the concurrence of *C*.

15. But notwithstanding these authorities, in the later case of *Willett v. Clake* (q), where the assignee of a bankrupt having purchased the bankrupt's estate, resold it, but there was a second agreement between the assignee and the purchaser from him, stipulating for a bond in case a title should not be made out by a given time, and the action was by the assignee, the seller, against *the purchaser from him, for not accepting the bond and paying the purchase-money, Richards, C. B., admitted the force of the objection as stated, and that there were conclusive authorities for that; yet he could not admit that they applied to this case, for that objection was wholly matter of equity, and could not be raised by the defendant in that proceeding at law, so as to deprive the plaintiff of his right to sue the purchaser at law in respect of a contract so contrary to law.—He did not consider that the equitable objection to the title could in any way be available in such an action at law. He knew from experience that nothing could be more dangerous than mixing up matters of equity with maxims of law, and carrying maxims of equity to courts of law, where questions of a very different nature are to be disposed of in a different manner and upon different principles. Courts of law, if they would consider topics of equity, had not the machinery for sifting such questions. Courts of equity have the means of getting at trusts and various other latent interests unknown to courts of law. Equitable matter must therefore be left to equitable courts, for they would only serve to embarrass courts of law with the consideration of evils over which they could exercise no control, and which they wanted the power and the means to remedy. The learned Judge added, that although in point of equity an assignee may not purchase the estate of a bankrupt, and his purchase being void or voidable, he might be able to make a good title himself, and his conveyance might not be avoided, *non constat* that he

(q) 10 Price, 207.

(I) This corrects the passage in 1 Marsh. where it is put as a devise to *A*, *B* and *C*, and the sale by *A* and *B* only, since they could give a good legal title without the concurrence of *C*.

could not do so at all, for it did not follow that sufficient parties to the conveyance might not be forthcoming. There was in equity a wide difference, recognised by the courts, between the considerations which belong to making titles and such as belong to making conveyance. So that the learned Judge's opinion appears to have depended not upon the general rule, but upon the particular circumstances of the case; for as the bond had been given, the seller might be enabled to obtain the concurrence of all necessary parties. And Mr. Baron Graham observed, that had the case rested on the first agreement, which was a common agreement for the sale and purchase of the premises, he should have considered the objection a complete answer to the action, for that the seller ought not to be permitted to recover against the purchaser the price of a title which he could not sustain in equity, and he should have thought the purchaser entitled to resist the payment of the residue of the purchase-money on that ground. But he considered the purchaser bound by the second agreement to accept the seller's bond and to complete the purchase. This case therefore really *furnishes no *authority* against the rule as settled in the case of *Maberley v. Robins*, which we may perhaps safely consider as the law of the Court.

16. The action which a vendor must bring is founded upon the equitable circumstances of the case between the parties. And in a case (r) in *B. R.* the Court would not permit the assignees of a bankrupt to recover money from his trustees, because the deed by which the trusts were created, although perhaps void at law, would probably be restored and set up again in a court of equity. The Court, I am informed, said they would not permit the assignees to recover, as it would be to no purpose. It would be merely driving the trustees to the other side of the hall, where they would most likely regain the property. This case seems in point; the same observation would apply to a vendor endeavoring to obtain the purchase-money where there were equitable objections to his title: the Court would naturally say, *cui bono*, when the purchaser can compel you to repay it in equity (1)?

17. The difficulty of course only arises where the seller can make a legal title, although there is an equitable objection to it, for if the contract is general, it amounts to an undertaking for the conveyance of a legal estate; and if the seller have no more than

(r) *Shaw v. Jukeman*, 4 East, 201.

(1) See ante, 530, note.

an equitable one, the contract is not binding upon the purchaser at law (s), nor, as we have seen, in equity, if the seller cannot procure the legal estate.

(s) *Cane v. Baldwin*, 1 Stark. Ca. 65.

SECTION VI.

OF TITLES DEPENDING UPON QUESTIONS OF FACT.

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| 1. <i>Fact not admitting of proof.</i> | 8. <i>Doubtful reference by codicil to a will.</i> |
| 3. <i>Deed depending upon extrinsic circumstances.</i> | 9. <i>Construction of ill-penned shifting clause : residence.</i> |
| 4. <i>Doubt raised by devise of shares where entirety sold.</i> | 10. <i>Issue upon pedigree.</i> |
| 7. <i>Title depending upon proof of party answering a description.</i> | 11. <i>Doubts as to legitimacy.</i> |
| | 13. <i>Doubtful fact at law.</i> |

1. A COURT of equity deals with questions of fact upon the same principle as upon questions of law. If the fact be of such *a nature as does not admit of proof, the Court will not compel a purchaser to accept a title depending upon it. Sir John Leach, V. C., observed, that a court of equity would not compel the acceptance of a title where there was reasonable doubt in law or in fact. In law, strictly speaking, there was no doubt, but practically there was often a doubt as to the application of settled principles. In matter of fact there is doubt, where the testimony is direct, because it may be given *mala fide*, or, if *bona fide*, by mistake. In assuming the jurisdiction of a specific performance, courts of equity are compelled to grapple with these difficulties (a).

2. Therefore where (b) after a contract had been entered into, the seller executed a deed which was held to amount to an act of bankruptcy, although the seller in his examination swore that he owed no debt upon which a commission could issue, and the purchaser could not disprove the statement, and the Master reported in favor of the title, the Court properly refused to compel the purchaser to take the title. Sir W. Grant observed, that if

(a) 6 Madd. 57.

(b) *Lowes v. Lush*, 14 Ves. jun. 547.

the plaintiff could with precision ascertain that there was no creditor who could take out a commission, there was an end of the force of the objection, but the difficulty was, by what process that could be ascertained. It was truly stated, that even under a reference to inquire what debts were owing by the vendor at the time when he executed the deed, a report that there were none, would not give such an assurance. What obligation was there upon any creditor to come in before the Master? Now by not coming in, would he be barred from the remedy which the law gives him by taking out a commission? A report then that no creditor appeared upon the advertisement would not give security to the title. The Court therefore refused to oblige the purchaser to take a title which it could not warrant to him. The learned Judge observed on another occasion, that there was no defect in title, properly speaking, but the party could not give the estate, as ultimately it might not be his, but the estate of the assignees (c).

3. Upon the same principle, where (d) the title depended upon a deed executed by the seller, which it was contended was either a fraudulent preference or an act of bankruptcy, the Court observed that, assuming that such a deed would be valid if made upon good consideration and *bona fide*, it was plain that the *bona fides*, and consequently the validity of the deed, might depend upon circumstances of conduct extrinsic the deed. With these circumstances the purchaser had no connexion, nor any adequate means of *ascertaining their existence. This was not like the case where a grantor, who was himself affected with an equity, could yet give a clear title to an assignee without notice. Here the deed, if not made *bona fide*, was as much void at law as in equity, and an assignee without notice could have no better title than his assignor. His opinion therefore was, that a court of equity ought not to compel the purchaser to accept the title, because, assuming it not to be fraudulent *ex facie*, it still might be avoided by circumstances extrinsic, which it was neither in the power of the purchaser or of the Court to reach (1).

4. So where a testator, who appeared to be seised of the entirety of an estate, devised his undivided moiety or half part of it, and all other his shares, proportions, and interests, if any, therein, and no evidence appeared that he had not the entirety, and the words

(c) 14 Ves. jun. 557.

(d) Hartley v. Smith, Buck, 360.

(1) See Gans v. Renshaw, 2 Barr, 34.

were sufficient if he had to pass it, Lord Eldon was of opinion that the title was good ; but he was also of opinion, that this was not a reasonably clear marketable title with that doubt as to the evidence of it which must always create difficulty in parting with it, and therefore he refused to force the title on a purchaser (e).

5. In *Nouaille v. Greenwood* (f), a recital in a will stated that the testator's wife had passed a fine of her estate, and had settled the same in trustees, and had given them a power to raise 500*l.*, and to make the estate chargeable with the payment thereof. A recovery was suffered by the wife, who survived the husband, although no estate tail was shown, and a mortgagee, to whom she had previously conveyed in fee, did not concur. If a legal estate tail had been created, the recovery was bad, and it was insisted that such was the presumption from the recital of a settlement and from the recovery ; but Lord Eldon said, that although the expressions in the recital were inaccurate, the presumption seemed to be that the legal estate was vested in the trustees. The settlement was not noticed in the deed to lead the uses of the recovery ; but although there was no doubt that many recoveries had been suffered unnecessarily, it was reasonable to suppose that the recovery was suffered with reference to the settlement. If, then, the legal estate was in the trustees, he thought the recovery a good equitable one.

6. In the above case Lord Eldon relied upon the continued enjoyment under the title as made out, and also upon a transfer of mortgage to Mr. Baron Smyth, in 1746 ; for he said, although at the time of that transfer there was no evidence that he had all the antecedent instruments before him, yet it was a strong thing to say that the title was not examined ; we ought to give credit to men of eminence in the Profession who were dealing for their own security, and therefore must conceive that the title was not accepted without examination.

7. So in a later case (g), where the devise was to such child who should be brought up and educated as a member of the established church of England, and should be a constant frequenter thereof, and it was objected, that this description was in its nature of uncertain proof, and was, in fact, inadequately proved ; Leach, V. C., held, that it could not be insisted that a purchaser was not bound to take

(e) *Stapylton v. Scott*, 16 Ves. jun. 272 ; see *Magennis v. Fallon*, 2 Moll. 580.

(f) *Turn. & Russ.* 26.

(g) *Smith v. Death*, 5 Madd. 371.

a title which in some measure depended upon matter of fact, for almost every title must in some degree depend upon such matter ; that the matter of fact upon which a title depended might be such as not in its nature to be capable of proof, as in the case of *Lowes v. Lush*, and such a title a purchaser could not be compelled to take ; or the fact might, in its nature, be capable of satisfactory proof, and yet not satisfactorily proved ; and courts of equity, by assuming a jurisdiction to compel the specific performance of agreements, necessarily forced upon themselves the difficulty of determining such questions ; and that in the present case it did appear to him that the fact was capable of proof, and was satisfactorily proved.

8. But where the title depended upon a will, by which the estate was given to a cousin, if living at a given period, in fee ; and if not, to her issue in fee ; and there was a codicil in which the testator stated that he had, by his will, devised to *JA* in fee, *as therein mentioned* ; *JA* was the son of the cousin, and therefore really a devisee in the will, although not *nominatim*. The objection was, that another will might be the one referred to ; but the Court was of opinion that the codicil did refer to the will that had been produced. If the codicil had referred to a person who did not take under the will, that might have been a good ground of objection. The reference in the codicil was therefore held to be no objection to the title (*h*).

9. A purchaser has been compelled to take a title depending upon the construction of an ill-penned shifting clause requiring the devisee to live and reside on the estate, although the fact of residence in a strict sense was not made out (*i*). The title therefore depended upon a question of law, and one of fact, both of difficult solution.

*10. Where a doubt has been raised upon a pedigree in a title, the Court has directed an issue to try the fact, making the purchaser the defendant. In such a case a new trial will be granted or refused upon the ordinary rules of evidence (*k*). This is certainly a strong measure to try such a question behind the back of the party who would be entitled if the seller's title failed.

11. There are many cases in which a jury will collect the fact of legitimacy from circumstances in which it might be attended with so much reasonable doubt, that equity would not compel a

(*h*) *Howarth v. Smith*, 6 Sim. 161. & Russ. 530.

(*i*) *Fillingham v. Bromley, Turn.* (*k*) *Edwards v. Harvey*, Coop. 39.

purchaser to take it merely because there was such a verdict. The Court ought to weigh whether the doubt is so reasonable and fair that the property is left in his hands not marketable (*l*).

12. In a case where it was argued that difficulties appeared upon the abstract that could not be altogether accounted for, unless upon some doubt of legitimacy, and evidence of rumors of legitimacy was proposed before the Master, Lord Eldon observed, that it would be very dangerous as to that to say the Master was to be at liberty to receive such evidence in order to entitle him to call for proof of legitimacy. After examining the nature and weight of the evidence in the case, Lord Eldon added, that under the circumstances, strong in favor of legitimacy, if the question was between those parties, it could not, though the register of marriage could not be produced, be stated to a jury as an inference fairly questionable. It was, he admitted, very different as to a purchaser. But admitting that principle of distinction, the Court, he said, ought to hesitate long before it would act upon such grounds to the destruction of legitimacy not appearing to have been ever before this transaction called in question (*m*). It became, however, unnecessary to decide the point.

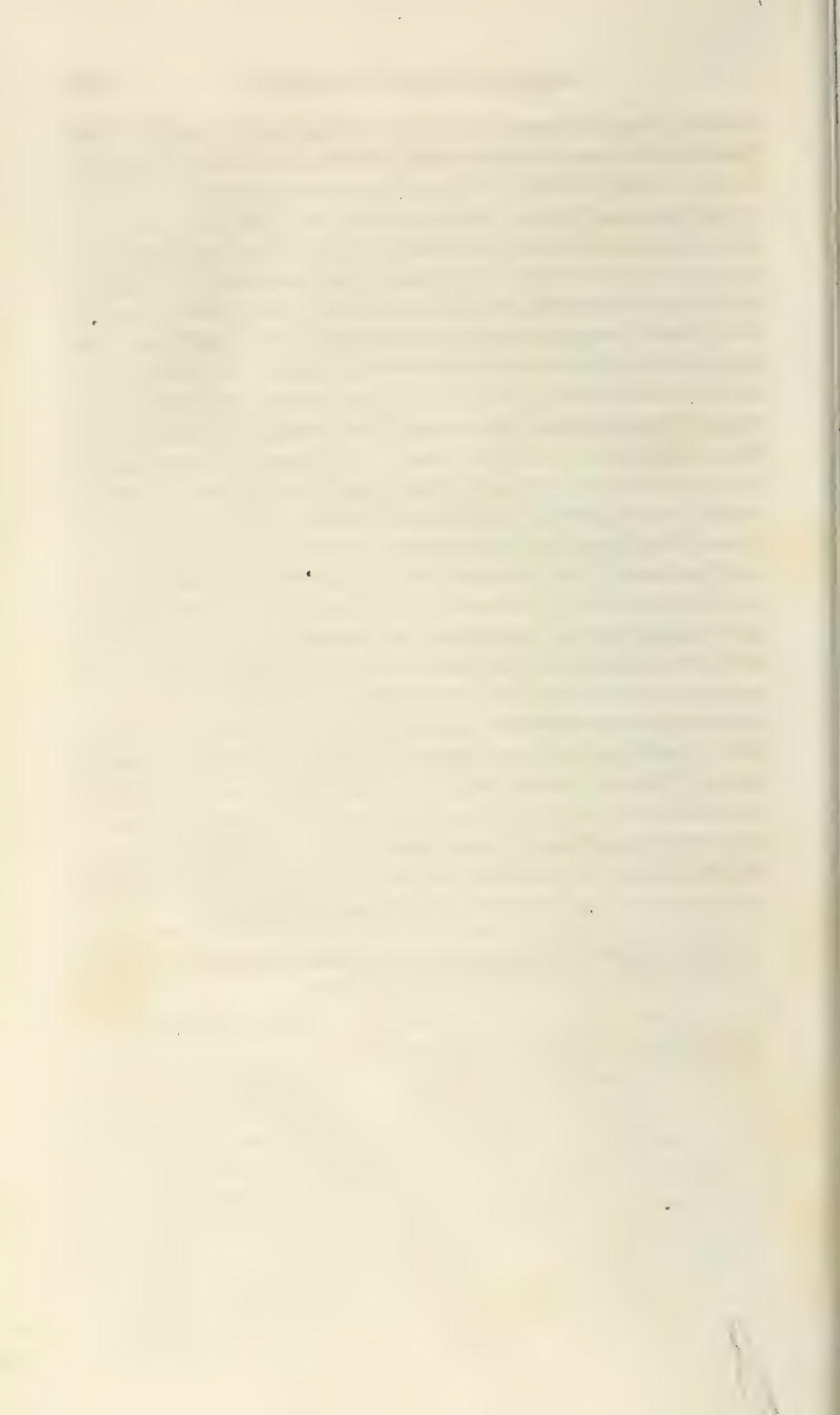
13. And where the title depends upon a fact which is left in doubt, a court of law will act upon the doubt as well as a court of equity. Thus in a case before Lord Kenyon at *nisi prius*, where the estate sold was alleged to be subject to a right of common every third year, Lord Kenyon said, if there was any color for the claim, that was sufficient to entitle the purchaser to avoid the bargain ; he was not obliged to buy a law-suit (*n*) (1).

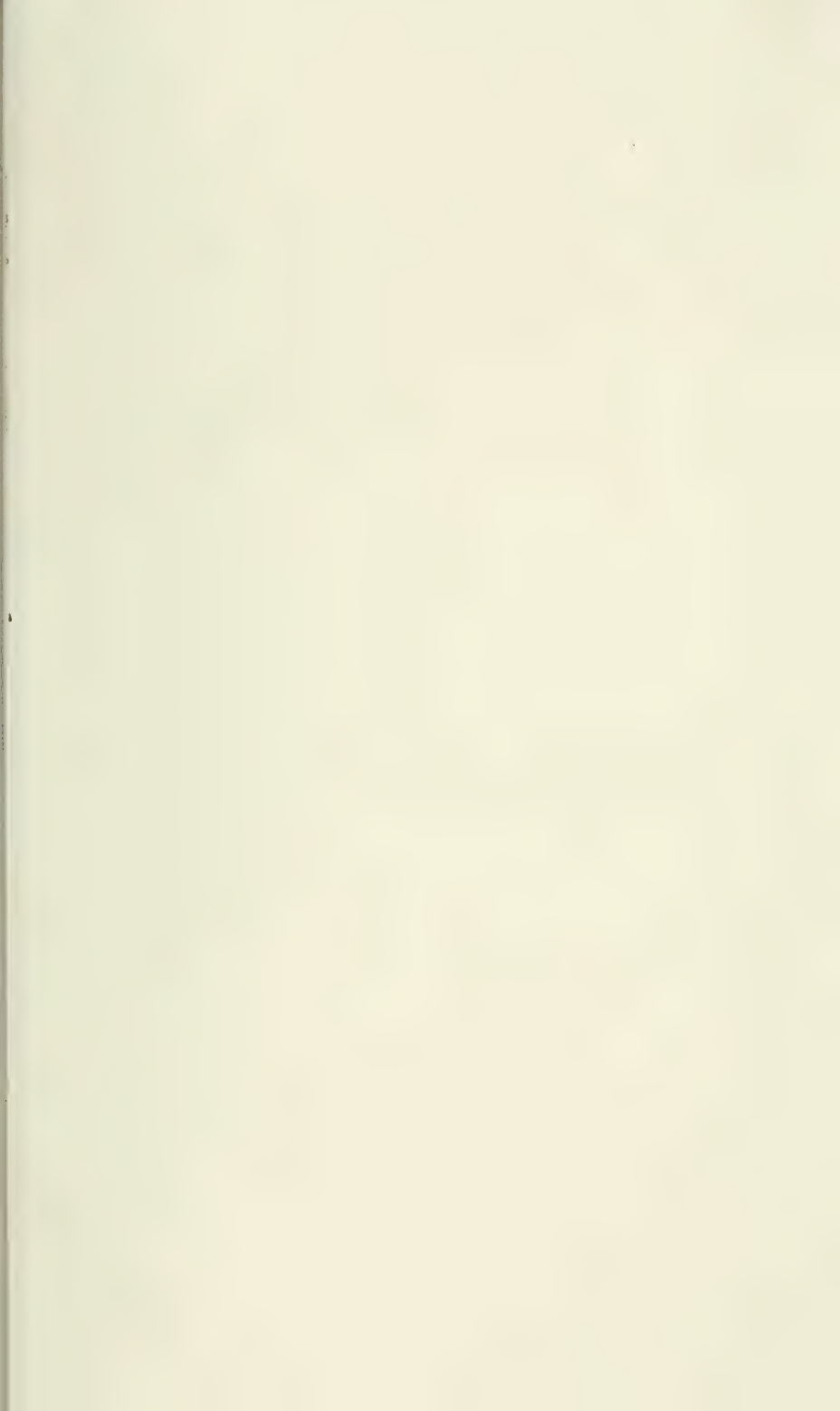
(*l*) *Per* Lord Eldon, 8 Ves. jun. 428.

(*n*) *Gibson v. Spurrier*, Peake's Add.

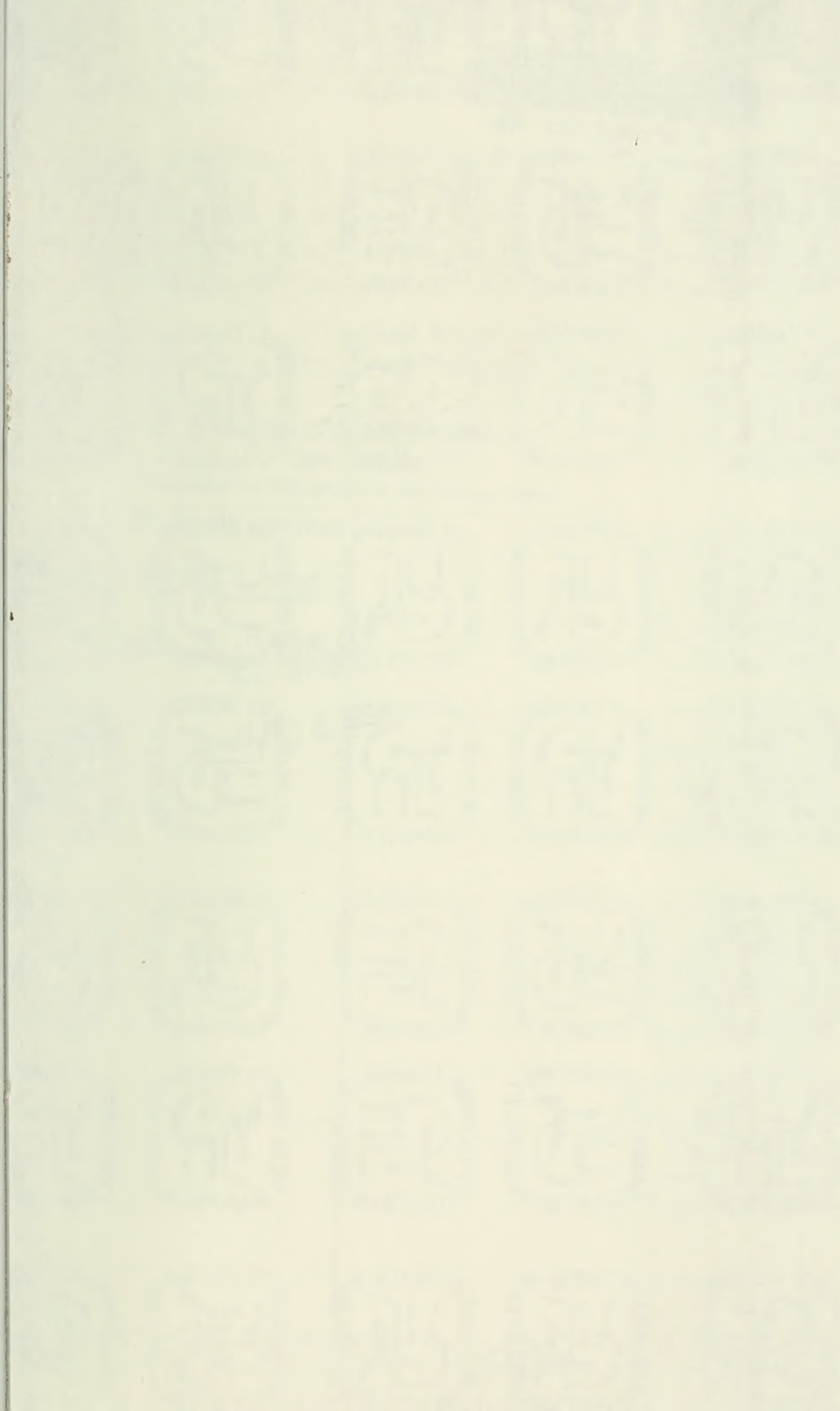
(*m*) *Lord Braybroke v. Inskip*, 8 Ves. Cases, 49.
jun. 417.

(1) See ante, 530, and note.



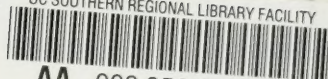








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